(7)

No. [redacted] .24

In the Supreme Court
of the
United States

October Term, [redacted] 1925

WESTERN UNION TELEGRAPH COMPANY, Petitioner

versus

STATE OF GEORGIA,
As Owner of Western & Atlantic Railroad
and
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY
As Lessee Operating Said Railroad Under the Corporate
Name and Style of
WESTERN & ATLANTIC RAILROAD, Respondents

PETITION FOR CERTIORARI

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANT OF THE WRIT OF CERTIORARI

FITZGERALD HALL,
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Attorneys for Respondents

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Of Counsel.

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BRIEF OF RESPONDENTS ON PETITION FOR CERTIORARI

MAY IT PLEASE THE HONORABLE COURT:

The respondents respectfully request that the petition for certiorari in this cause be denied for the following reasons:

I

The petitioner, The Western Union Telegraph Company, has not complied with Rule 37 of this Court in that petitioner has failed to file as an exhibit to the petition a certified copy of the entire transcript of the record of the cause.

II

There is no question of public importance involved. This is simply a controversy between the Western Union Telegraph Company and the State of Georgia and the lessee of the State of Georgia's railroad. Petitioner has had a thorough hearing in all the courts of Georgia. No question for the future guidance of the parties, no question of paramount interest, indeed no question of public interest at all is involved.

III

THE PETITION FOR CERTIORARI NOT PRESENTED IN TIME

Upon Writ of Error to the Superior Court of Fulton County, Georgia, the cause was taken by defendant below, (petitioner for the writ of certiorari), to the Supreme Court of Georgia. In that Court the decision of the Lower Court was affirmed by operation of law, the Justices of the Supreme Court of Georgia being in number equally divided as to whether the decision should be affirmed or reversed.

This was the only thing *decided*. Opinions were rendered expressing merely the views of members of the Court upon some of the questions made.

The judgment of the Supreme Court of Georgia, thus affirming the judgment of the lower Court, was rendered on the 13th day of September, 1923.

An application for rehearing was made by said defendant, which application was denied on September 29, 1923.

Under Rule 38 of the Supreme Court of Georgia no oral argument of such a motion will be allowed unless the Court shall issue a rule *nisi* thereon. No such rule was issued. The petition for rehearing was denied, by simple order of the Court, without further judgment or opinion.

The petition for certiorari was presented to the Supreme Court of the United States after more than three months from the judgment of affirmance. It was presented too late.

An application for a writ of certiorari to a State Court, made after the expiration of the three months limited by the Act of September 6, 1916 (39 Stat, at Large 726) cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ.

Rust Land & Lumber Company vs. Jackson et al, 250 U. S. 71, 76.

The mere overruling, without opinion, of a petition for rehearing, cannot be made the basis of a writ of error.

Jett Brothers Distilling Co. vs. City of Carrollton, 252 U. S. 1, 7.

Nor can the claim of immunity under a law of the United States, made in a petition for rehearing, be made the basis of a writ of error, unless it was considered and decided adversely by the State Court.

McKay vs. Kalyton, 204 U. S. 458, 463. The same principle applies to a petition for certiorari.

IV

QUESTIONS AS TO "FULL FAITH AND CREDIT" CLAUSE AND IMPAIRED OBLIGATION OF CONTRACT MADE TOO LATE

The Western Union Telegraph Company, based its claim to remain upon the right of way of the Western & Atlantic Railroad, property of the State of Georgia, among other things upon an alleged Act of the General Assembly of Georgia of January 27, 1852 (Ga Acts of 1851-2 p. 193).

It claimed that by this Act a prior contract, made between the chief engineer of the Western & Atlantic Railroad and Garst and Bean, for construction of a telegraph line along that railroad, had been ratified, and that said Act had granted to the Augusta, Atlanta and Nashville Magnetic Telegraph Company authority, in perpetuity, and assignable, to construct and maintain telegraph lines upon said right of way; and that by assignment the Western Union Telegraph Company had succeeded to said right.

The title of the Act was: "An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company."

The plaintiffs below, the State of Georgia and the Nashville, Chattanooga & St. Louis Ry., (as Lessee of the Western & Atlantic Railroad), moved to strike that portion of the answer which claimed that this Act ratified the alleged contract between such chief engineer and Garst & Bean, upon the ground, among others, that that portion of the Act was unconstitutional, in that it was in contravention of the Constitution of the State of Georgia, of force when the Act was passed, which provided that no law or ordinance should pass "containing any matter different from what is expressed in the title thereof."

This motion to strike was sustained and to this ruling the said defendant excepted and assigned error upon it in the Supreme Court of Georgia.

Three of the Justices of that Court were of the opinion that the said Act was unconstitutional, and three that it was not, the respective views, *pro* and *con,* being stated in opinions rendered by Russell, Chief Justice and by Judge Custer, (presiding in the place of a Justice who was disqualified).

The motion for rehearing was entirely devoted to assertions that in holding the Act unconstitutional the Justices who so held had overlooked certain previous decisions of the Court and statutes of Georgia; did not pass upon the validity of the Garst & Bean contract, dis-

associated from its ratification by said Act of 1852, (nor did the other three Justices); that all the Justices had *lost sight* of an alleged contract of the year 1870 between Blodgett, then Superintendent of the Western & Atlantic Railroad and the Western Union Telegraph Company, approved by the then Governor of Georgia, (which had also been set up in the lower Court and held by that Court to be void because not authorized by the General Assembly); that all the Justices had overlooked certain resolutions of the General Assembly of Georgia; that all the Justices had overlooked differences between the claim of sovereignty of the State of Georgia as applicable to its railroad in Georgia, and as operating the part of the railroad in the State of Tennessee, citing certain decisions of the Supreme Court of Tennessee and certain statutes of that State; that the Court had, also, *lost sight* of the full faith and credit clause (Section 1, Paragraph 1 of Article 4) of the Constituion of the United States; that, in holding that the plea of *laches* was not available as against a sovereign State, the Court had *lost sight* of certain sections of the Code of Georgia, and, as this ruling applied both to Georgia and Tennessee, the Court had *overlooked* the above mentioned decisions of the Supreme Court of Tennessee and the full faith and credit clause of the Constitution of the United States; that the decision of Russell, C. J., concurred in by two other Justices, seemed to have overlooked statements in a report of said Chief Engineer as to his conversations with the then Governor of Georgia, followed by the said contract with Garst & Bean, and a statement in a letter of the Chief Engineer to the then Governor of Georgia, and testimony in the

case as to the value of a telegraph line to a railroad; that Russell, C. J., and said other two Justices had held that plaintiff must recover on the strength of its title, but had held, also, that the Court could take judicial notice of the fact that the State was the owner of the railroad, which holdings movant claimed were in conflict; that the same Justices held that it was immaterial whether the ownership was in fee or only of an easement, in doing which, as movant claimed, sight seemed to be lost of decisions of the Court as to differences between railroad rights of way and land and interests in land, and had apparently lost sight of the said full faith and credit clause, as to the part of the railroad which was in the State of Tennessee, citing some decisions of the Supreme Court of Tennessee.

It should be noted that in the motion for a rehearing the movant for the *first time* set up and relied upon the full faith and credit clause of the Constitution; and that the claim was not considered and decided adversely by the Court.

After filing the motion for rehearing, and two days before that motion was denied, the movant filed a paper in which it made "known to the Court" its claim that the decision of Russell, C. J., concurred in by said two Justices, and by operation of law the divided opinion of the Court holding, or sustaining the lower Court in holding, that the said Act of 1852 was unconstitutional, changed a rule of law of said Court and of the State of Georgia applicable to the contract made by said Act of 1852, and changed the rule of construction of said Court and State applicable to

the statute, which is repugnant to the Constitution of the United States and particularly to Art. 1, Sec. 10, par. 1 thereof, and which decision impairs the obligation of a contract, contrary to said provision.

This was the first time this particular claim had been asserted.

This paper was simply filed. It was never passed upon in any way. So far as appears it was never entertained or considered.

A Federal question first raised on a motion for rehearing in a State Appellate Court comes too late to serve as the basis of a writ of error from the Supreme Court of the United States.

Godchaux Co. vs Estopinal, 251 U. S. 179.

Mergenthaler L. Co. vs Davis and Hayes, 251 U. S., 256.

Bilby vs Stewart, 246 U. S. 255.

The same principle is applicable, of course, to petition for certiorari:

After judgment of affirmance it is too late to seek to raise the question as to validity of a statute, by petition for rehearing.

Rooker vs Fidelity Trust Co., decided by this Court Feby. 19, 1923, Advance Opinions No. 10, p. 339.

V

VALIDITY OF STATE STATUTE QUESTION FOR STATE COURTS

Error and not certiorari is the proper mode to review a judgment upholding a State statute, challenged as repugnant to the Constitution of the United States, or the laws of the United States.

Kennedy vs Supreme Lodge of Moose, 252 U. S., 411.

New Orleans & North Eastern R. R. vs Scarlet, 249 U. S. 528.

But the validity of a State statute, as to whether or not it conforms to the Constitution of the State,, is a question the decision of which by the highest State Court is not open to review even on writ of error.

Green vs Frazier, 253 U. S., 233.

Rindge Company vs County of Los Angeles, decided by this Court June 11, 1923, Advance Opinions No. 17, p. 704.

Old Colony Trust Co. vs Omaha, 230 U. S. 100, 116.

Fallbrook Irrigation Dist. vs Bradley, 164 U. S., 112.

Whether a State statute did or did not validate a contract theretofore unenforceable is a question for the State Courts to decide, and their decision is not subject to review in the Supreme Court of the United States.

Munday vs Wisconsin Trust Co., 252 U. S., 499.

VI

IMPAIRMENT OF CONTRACT BY JUDICIAL DECISIONS

The contract clause of the Constitution refers only to legislation subsequent in time to the contract alleged to have been impaired.

> Munday vs Wisconsin Trust Co., 252 U. S., 499, *Supra.*

It is noteworthy that the only decision of the Supreme Court of Georgia which was cited by Judge Custer as sustaining the view that the said Act of 1852 was constitutional, to wit, Goldsmith vs. Rome R. R., 62 Ga., 473, was rendered long after the Act was passed, its rendition being at the Feby. Term, 1879.

Long prior to the decision in Goldsmith vs Rome R. R., and prior to the passage of said Act of 1852, to wit, in the case of Martin vs Broach et al. 6 Ga. 21, 27, decided in 1849 the Supreme Court of Georgia had said:

> "Where the title specifies some of the objects for which the Statute was passed and contains this general clause, 'and for other purposes therein contained,' portions of the Act not specially incated in the title, are, nevertheless, good, under this general clause."

The necessity for such words as "and for other purposes" in order that the Act might be valid as to matters

not expressly indicated in the title, has since the decision in said case of Martin vs Broach, been repeatedly held by the Supreme Court of Georgia, and in Mayor of Macon vs Hughes, 110 Ga., 795, 797-804, the cases are considered and their effect fully stated. The title of said Act of 1852 contained *no such words.*

In holding that the Act of 1852 was unconstitutional Russell, C. J., and those Justices who concurred with him, followed a long line of authority, beginning almost with the creation of the Court.

And they did so as to an Act the title of which was simply to incorporate a telegraph company, whereas the body of the Act purported to give, what is claimed to be a perpetual and assignable right to portion of the right of way of the State's railroad, which it has jealously guarded.

That clause is not addressed to such impairments as may arise by mere judicial decisions in the State courts, without action by the Legislature, even though such Courts may have changed their decisions.

Ross vs Oregon, 227 U. S., 150, 161.

Moore-Mansfield Constr. Co. vs Electrical Installation Co., 234 U. S., 619.

Frank vs Mangum, 237 U. S., 309, 344.
Cleveland & P. R. Co. vs Cleveland, 235 U. S., 50.

The Constitution of the United States affords no pro-

tection against impairment of a contract by judicial decision.

Columbia Ry. & Co. vs State of South Carolina, decided by this Court Feby. 19, 1923, Advance Opinions No. 10 pamph p. 289.

Louisiana R. & N. Co. vs Behrman, 235 U. S., 146, 170.

New Orleans Water Works Co. vs Louisiana &c Co. 125 U. S., 18, 30.

VII

IMMUNITY UNDER THE TELEGRAPH ACT OF 1866

Claim was made by the Western Union Telegraph Company of certain rights under the Act of Congress of July 24, 1866, to aid in the construction of telegraph lines and secure to the Government the use of the same for postal, military and other purposes, and its acceptance of the restrictions and obligations of this Act.

But it was not contended, and if contended such a position could not be supported by any decision of this Court, that this Act and its acceptance by petitioner for certiorari, could give such petitioner the right to occupy property of others without their consent.

The contention was that the State of Georgia, in giving to the predecessors in title of said petitioner per-

petual and assignable easements (by the Act of 1852 above mentioned and by the contract of 1870 also above mentioned), had assented to and made it lawful for said Telegraph Company to make with the United States the contract evidenced by its acceptance of said Act of Congress of 1866.

But the said acceptance was made long before said Telegraph Company acquired, or claims to have acquired, any easement in the railroad right of way, and long before the year 1870.

And, if the Act of the General Assembly of Georgia was unconstitutional and the contract of 1870 was not valid, the said Telegraph Company did not acquire rights under them.

The Telegraph Act of Congress of 1866 did not and does not impose upon telegraph companies any obligation to maintain, use or sell easements or rights of way of their lines, when such easements or rights do not belong to such companies, and against the will of the real owners.

We respectfully contend that there appears no real and substantial question of denial of any title, right, privilege, or immunity under the Constitution or laws of the United States, involved in the judgment of the Supreme Court of Georgia, which would entitle petitioner to reveiew *by certiorari;* the above mentioned claim under the Telegraph Act of 1866 being the only claim of such title, right, privilege or immunity.

VIII

ACTION OF THE WESTERN & ATLANTIC RAILROAD COMMISSION

The claim that the action taken by the Western & Atlantic Railroad Commission, in authorizing the institution of the instant suit against the Western Union Telegraph Company, deprived petitioner of its property without due process of law, because such authority was given without affording the Telegraph Company a hearing, if substantial and if decided adversely to it by the Supreme Court of Georgia, might be reversible by writ of error, but does not furnish ground for review by *certiorari.*

But there is no substance in the claim. The Western & Atlantic Railroad Commission did not *determine* that the Telegraph Company had no right to maintain or operate the line or lines in question, nor attempt to do so.

The Act of Nov. 30, 1915 (Georgia Acts of 1915—Extra Session, p. 119) does not give such authority to the Commission.

It does give the Commission authority to consider and determine, subject to the provisions of the Act:

> "What, if any, steps should be taken to assert the right and title of the State to any part of the right of way or properties of the road that may be adversely claimed or occupied." (Said Acts pps. 121 & 122.)

The amending Act of Aug. 4, 1916 (Georgia Acts of 1916, pps. 146 & 147) does not contemplate any action by the Commission finally determining the rights of any one contrary to his will, but empowers the Commission to institute suits to cause removal and discontinuance of encroachments.

And what the Commission did was to pass a resolution that, the lessee (the Nashville, Chattanooga & St. Louis Railway) having represented to it that the Telegraph Company was adversely using and occupying the right of way, without authority from the State and without the consent of the lessor, and requested the Commission to take appropriate action for removal of the encroachment and discontinuance of the adverse use; that counsel for the Commission having reported that the adverse use of the right of way by the Telegraph Company was without lawful authority from the State of Georgia, and that institution of *appropriate proceedings* for removal of the encroachment and discontinuance of the use was within the purview of the Act of Aug. 4, 1916 and the lease contract; therefore, it was resolved, that the counsel for the Commission be authorized and directed to institute and prosecute, in the name and behalf of the State, such suits, and legal proceedings as might be appropriate for removal of the encroachment and discontinuance of the use, provided the lessee should join in the suit and defray the expenses thereof, (according to the provisions of the lease contract.) Assertions, on pp. 13, 19, 23, 48-55 of the petition for certiorari (pp. 5, 7, 8, 16-19 of the petition for certiorari as printed) to the contrary of what is above stated, are not correct.

In pursuance of that authority the instant suit was instituted, and if any person has ever had opportunity to be heard to assert his claims the Western Union Telegraph Company has had such opportunity in this litigation.

IX

OWNERSHIP OF THE WESTERN & ATLANTIC RAILROAD BY THE STATE OF GEORGIA

The Western & Atlantic Railroad was built by the State of Georgia, from Atlanta, Georgia to Chattanooga, Tennessee, out of public funds and for public purposes. The railroad belongs, and has always belonged, to the State alone.

The public character of the enterprise and the nature of the ownership appeared in numerous Public Acts of the General Assembly of Georgia, beginning with the year 1836, and in every one of the various codifications of her statutes.

It was never questioned by defendant below that the State had a right of way for that railroad from Atlanta to Chattanooga, and that the telegraph lines were on that right of way. In fact it was expressly so admitted. It is expressly stated in the petition for certiorari (p. 4 of said petition, p. 2 of the petition as printed).

Not only is this true but the only right which defendant below claimed, to keep its lines on that right of way, was long occupancy thereof, by itself and predecessors in title, under alleged grants from the State.

So there was no inconsistency in the statement in the opinion of Chief Justice Russell as to how far it was necessary for the State to go to cast the burden upon the defendant.

Nor was it incorrect for him to say, as he did, that it was "immaterial at this time to decide whether the ownership" (of the right of way by the State) "is in fee or only an easement."

The Telegraph Company has in several cases unsuccessfully sought, as it did in the instant case, to derive advantage from the position that a railroad right of way is only an easement.

One of these cases is Western Union Tel. Co. vs Pennsylvania R. R. Co., 195 U. S., 540, in which Mr. Justice McKenna, speaking for the Court, after considering many cases said (pp. 570-571):

> "A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation. In other words it is entitled to the protection of the Constitution, and in the precise manner in which protection is given."

In Western Atlantic R. R. Co. vs Western Union Telegraph Co., 138 Ga. 420, it was held that:

> "A telegraph company can not construct a line of telegraph over the land of the State without permission of the State."

This was said of the very same right of way involved in the instant case. The Western Union Telegraph Company had, for many years, occupied the right of way under contract with the Nashville, Chattanooga & St. Louis Railway and upon the expiration of that contract sought to condemn the right of way. The State of Georgia afterward became a party to the litigation, the Governor of the State having been served with condemnation notice; and the Supreme Court of Georgia held that the Condemnation statutes did not apply to property owned by the State.

> Western Union Tel. Co. vs Western & Atlantic Railroad Co., 142 Ga., 532.
>
> Western Union Telegraph Co. vs. State of Georgia, 142 Ga., 535.

The condemnation proceedings in those cases expressly recognized the ownership of the right of way by the State and asserted that it was necessary for the Telegraph Company to acquire *by condemnation* the right of way for telegraph purposes.

Thereafter it abandoned its attempt to condemn but remained on the railroad right of way until the complaint in Equity was filed in the instant case.

All of the above appeared in evidence in the instant case.

X

FORMER LITIGATION BETWEEN THE WESTERN & ATLANTIC RAILROAD COMPANY AND THE WESTERN UNION TELEGRAPH COMPANY

Reference is made in the "Statement of the case and brief for petitioner, filed in support of the petition for certiorari," (pp. 29 and 30 of the printed copy), to litigation in 1872 between the Western & Atlantic R. R. Co. and the Western Union Telegraph Co., and the statement is made that the contract of 1870, herein before mentioned, was upheld in that case in 91 U. S., 283.

But neither the State of Georgia nor the Western & Atlantic Railroad, nor the Nashville, Chattanooga & St. Louis Ry., was a party to that cause. The then Western & Atlantic Railroad Company, was a distinct corporation, composed of private individuals, which in 1870 leased the road, for twenty years, from the State.

And in that case this Court expressly declined to pass on the question as to whether the contract of 1870 was or was not void.

We fear that much of what has been above said may be deemed unnecessary, and, it may be, out of place, because questions are discussed which could not be raised by petition for certiorari, but petitioner has sought to so raise them.

Believing that the petition was not filed in time, and that no substantial question, proper to be reviewed upon certiorari, is shown by the petition, we respectfully pray that the writ may be denied.

Respectfully submitted,

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FILED
APR 20 1925
WM. R. STANSBURY
CLERK

No. 24

In the Supreme Court
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BRIEF FOR STATE OF GEORGIA AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY
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BRIEF FOR STATE OF GEORGIA AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

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OCTOBER TERM, 1924

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Plantiff in Error, and Petitioner for Writ of Certiorari
versus
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As owner of Western & Atlantic Railroad
and
Nashville, Chattanooga & St. Louis Railway
As Lessees of Western & Atlantic Railroad
Defendants in Error and Respondents to Petition for Writ of Certiorari

No. 243

BRIEF FOR DEFENDANTS IN ERROR AND RESPONDENTS

STATEMENT OF THE CASE

In the year 1836 the General Assembly of the State of Georgia passed an Act for the construction of the Western & Atlantic Railroad, "as a State work and with the funds of the State," from some point on the line of the State of Tennessee to some point on the Chattahoochee river in Georgia.

Record p. 199-201.

By Acts of 1837, 1838 and 1839 authority was given for the sale of interest bearing scrip, in order to procure funds for the work.

Record pps. 201-202.

In 1838 the Legislature of Tennessee passed an Act, with the caption, "An Act to authorize the State of Georgia to Extend Her W. & A. R. R. from the Georgia Line to Some Point on the Eastern Margin of the Tenn. River." This Act provided that the State of Georgia should be allowed the right of way for the extension and construction "of her said railroad," from the Georgia line to the Tennessee river, and that she shall be "entitled to all privileges, rights and immunities * * * and be subject to the same restrictions, as far as they are applicable, as are granted, made and prescribed for the benefit, government and direction of the Hiawassee Railroad Company."

Record pps. 212-13.

By Act of the Legislature of Tennessee passed in 1848 it was provided that all the rights, privileges and immunities, with the same restrictions, which had been given to the Nashville and Chattanooga R. R. Company, by Act of Tennessee of Dec. 11th, 1845, were, so far as they were applicable, given to and conferred upon the State of Georgia, "to be enjoyed and exercised by that State in the construction of that part of the W. & A. R. R. lying in Hamilton County, Tennessee, and in the management of its business."

Record p. 213.

The Act of the Legislature of Tennessee, incorporating the Nashville & Chattanooga Railroad Company, gave to that company, among other things, the right to purchase and hold in fee or for a term of years any lands, etc., necessary for the road, and the right to acquire land for constructing the road by condemnation, the lands or right of way to vest in the company in fee simple.

Record pps. 213-215.

Similar provisions were in the Act incorporating the Hiawassee Railroad Company.

Record pps. 215-218.

The General Assembly of Georgia provided by an Act passed in 1847 "that it shall be the duty of the Governor to have completed, at the earliest practicable day, the W. & A. R. R. and that he cause the same to be equipped and used to the best advantage through its entire length from Atlanta to Chattanooga."

Record p. 209.

By an Act of Feby. 23rd, 1850, it was provided: "The Governor shall not sell at any time any part of the right of way heretofore acquired by the State, nor any property or land that may be necessary now, or at any other time, for the erection of depots, wood yards, or water stations, or for any other improvement necessary or convenient to said road."

Record p. 210.

By an Act of Jany. 15th, 1852, it was made the duty of the Governor of Georgia to appoint a Superintendent of the W. & A. R. R., and among other powers given such Superintendent were the following:

> "He shall also contract for and purchase machinery, cars, materials, workshops, and all other things necessary and proper for the construction, repair and equipment of the road and its general working and business; but all contracts and expenditures which exceed the sum of five thousand dollars, shall be subject to the approval of the Governor."

Record p. 211.

By the Code of Georgia, Section 1287, it is provided:

> "The railroad communication from Atlanta in Fulton County, to Chattanooga, on the Tennessee river is the property of this State exclusively, and shall be known as the Western & Atlantic Railroad."

Record p. 199.

On Oct. 11th, 1850, Wm. Mitchell, Chief Engineer of the Western & Atlantic Railroad, wrote a letter to David W. Garst and James M. Bean, in which he stated that having reflected as to their note of the day before and having had conversations with Governor Towns, (then

Governor of Georgia), and they, said Mitchell and Towns, being satisfied, not only from the nature of the telegraph but from experience of other roads, that there was no appendage more valuable in the efficient management of a railroad than a telegraph line, had concluded to submit to Garst and Bean this proposition:

"1. To furnish and erect the posts from Atlanta to Chattanooga * * * * *.

2. To grant you the use of our right of way for the telegraph company, and to pass your officers and materials along the road free of charge.

3. For and in consideration of the foregoing, the W. & A. R. R. is to receive the sum of Five Thousand Dollars to be placed to its credit upon the books of the Telegraph Company, and instead of interest upon that sum is to receive dividends as they may be declared from time to time, and to be represented in the meetings of the company to that amount by the Chief Engineer, or such other person as may be appointed to represent the same.

4. And in further consideration of the foregoing services and grant, all the telegraph offices between Atlanta and Nashville erected by the company shall be subject to the use of said road free of charge, and said company shall erect as many offices as the road may require in addition to the regular offices of the company, but the latter shall be at the expense of the road."

By reply of Oct. 11th, 1850, Garst and Bean accepted the above proposition.

The above appears from a report of said Mitchell to Governor Towns of Sept., 1851, in which report he states that Garst and Bean proposed to organize a company, called the "Augusta, Atlanta & Nashville Tel. Cop.," and to build for them a telegraph line from Atlanta to Nashville, which was subsequently made to embrace the Georgia Railroad and extend to Augusta; that Garst retired and Bean prosecuted the enterprise alone; that after the above mentioned acceptance by Garst and Bean he (Mitchell) passed an order that so soon as the telegraph company was sufficiently organized to warrant the undertaking, the resident engineer and roadmaster arrange to carry out "our" part of the contract, but "we" did not commence planting the posts until May, 1851; that the work had progressed slowly, but all the posts had been delivered and half or more planted and the wire stretched beyond Kingston; that "our" outlay of money for the job had been little beyond the cost of the posts, fifteen cents apiece, and "we" expect the line to be in working order as far as Chattanooga in a month or two more.

Record pps. 138-139.

On Jany. 27, 1852, the General Assembly of Georgia passed an Act the title or caption of which was:

> "An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Tel. Co."

By this Act certain persons, including James M. Bean, were declared a body corporate for constructing, etc., a line of telegraph from Augusta, through Atlanta to Nashville, or any other route through the State of Georgia.

Sec. VI of the Act provided:

> "That the contract entered into on the eleventh day of October, 1850, by William L. Mitchell, Chief Engineer of the W. & A. R. R. and D. W. Garst and J. M. Bean on the part of said company, be and the same is hereby ratified and affirmed, and that at every election, each share shall entitle its holder to one vote. * * * *. And in case of an equal number of votes on both sides, the election shall be decided by lot, and the Chief Engineer of said railroad, or other officer having the chief control of said road for the time being, shall by himself, or his proxy, duly authorized, cast the vote to which the State is entitled under said contract."

Sec. IX of the Act provided that said telegraph company "shall have power and authority to set up their fixtures along and across any highroad or highroads; and any railroad which now or may hereafter belong to this State * * * * * without the same being held or deemed a public nuisance, or subject to be abated by any private person."

Record pps. 280-282.

The State of Georgia, as such, constructed the railroad, and through officers and agents appointed and em-

ployed by it operated the same until, under an Act of its General Assembly of Oct. 24th, 1870, it was leased to Jos. E. Brown and his associates, known as the Western & Atlantic Railroad Company, for the term of twenty years from Dec. 27th, 1870. The lease Act authorized the lease of "the W. & A. R. R. which is the property of the State, together with all its houses, work shops, depots, rolling stock and appurtenances of every character," and the property leased was so described in the contract of lease.

Record pps. 218-219.

The property was operated by the said "Western & Atlantic Railroad Company" for said term of twenty years.

On Nov. 12th, 1889, the General Assembly of Georgia passed an Act authorizing the lease of the "W. & A. R. R. together with all its houses, workshops, rolling stock, depots and appurtenances of every kind and character," the lease to take effect after the expiration of the above stated lease.

Under this Act lease was made, July 18, 1890, to the Nashville, Chattanooga & St. Louis Railway of "the said W. & A. R. R., a railroad running from the City of Atlanta, in State of Georgia, to the City of Chattanooga, in the State of Tennessee, together with all its houses, work shops, rolling stock and appurtenances of every kind and character, being the property of the State of Georgia," for a term of twenty-nine years.

Record pps. 219.

Under the provisions of the lease Act of Nov. 12th, 1889, the leasing railroad corporation became a corporation operating the property under the corporate name of "Western & Atlantic Railroad Company."

On Nov. 30th, 1915, the General Assembly of Georgia passed an Act for the lease of the property to be effective upon the expiration of the last above named lease.

Under this Act a commission was created, known as the W. & A. R. R. Commission.

The Act provided that the Commission should, among other things, "consider and determine, subject to the provisions of this Act, the following:

> "* * * * * * 8. What, if any steps should be taken to assert the right of title of the State to any part of the right of way or properties of the road that may be adversely used and occupied."

Also, (Sec. 8 of the Act), that the Commission was instructed and directed to prepare, so that the same might be presented to the General Assembly, with its report, bills carrying into effect any recommendation the Commission might make—"with respect to what steps should be taken to assert the right and title of the State to any part of the right of way of any part of the road that may be adversely used or occupied."

It was provided further by said Act that the persons

or corporation leasing the property if not already a corporation of Georgia, should become a corporation under the laws of Georgia, under the name of the "Western & Atlantic Railroad."

Record pps. 220-222.

By an Act of Aug. 14th, 1916, amendatory of the last above Act, it was provided:

> "Section 5-A. The said Commission, subject to direction in specific cases by the General Assembly, is hereby given full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and uses and occupancies of any part of the right of way and properties of the W. & A. R. R. by any person other than the present lessee, * * * * whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor. The said Commission is hereby fully authorized and empowered to determine whether such encroachments, uses and occupancies, or any of them, shall be removed and discontinued, or whether they or any of them shall be permitted to remain, and, if so, to what extent and upon what terms and conditions. The said Commission is further authorized to adjust, settle, and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties * * * * in such manner and upon such terms

and conditions as it may deem the best interests of the State require; and all contracts and agreements that said Commission may make or enter into in settlement or disposition of all matters touching such adverse use and occupancies shall be binding upon the State. The said Commission is further authorized * * * * to take such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment,

use or occupancy of said right of way and properties which in its opinion should be removed or discontinued, and other legal proceedings as it may deem appropriate in protection of the State's interest, or the assertion of the State's title."

Record pps. 230-231.

Under the last above two Acts and another not important here, the properties were leased, by a contract of May 11th, 1917, to the Nashville, Chattanooga & St. Louis Railway for fifty years from Dec. 27th, 1919.

By Section Fourteenth of the lease contract it was provided:

"The right is hereby expressly reserved to the party of the first part (the State of Georgia) to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way or upon the other properties of the W. & A. R. R. or any part

thereof, whether maintained under claim of lawful right or otherwise; and to this end the party of the second part (N. C. & St. L. Ry.) hereby consents that the State may withhold delivery of possession, or right of possession to the party of the second part of such parts of the right of way and other properties as may be so adversely used or occupied, until such encroachments and other adverse uses and occupancies shall have been removed or discontinued; and the State of Georgia may, at its option and in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies, acting therein in its own name and behalf as the owner of the property. * * * * the party of the second part will, if and when so requested, join with the State and become a party to any proceeding, judicial or otherwise, that may be instituted by and on behalf of the State for the purpose of freeing the right of way and property of the W. & A. R. R. from all adverse uses and occupancies; * * * * * * *.

"When such adverse uses and occupancies shall have been removed by judicial proceedings or otherwise the use of the same for the remaining period of the lease shall inure to the benefit of the party of the second part to the same extent as the other portions of the right of way and properties herein conveyed shall inure to it under the terms and provisions of this contract."

Record pps. 228-229.

Thereafter, the Nashville, Chattanooga & St. Louis Railway, lessee of the W. & A. R. R., having represented to said Western & Atlantic Railroad Commission that the Western Union Telegraph Company was adversely using and occupying the right of way of the railroad with lines, poles and wires and other appurtenances, without authority from the State of Georgia and against the consent of said N. C. & St. L. Ry., and having requested the said Commission to take appropriate action for the removal of the encroachment and discontinuance of this adverse use, in pursuance of the Act creating the Commission, as amended, and said paragraph 14 of the lease contract, the Commission authorized and directed its counsel to institute and prosecute, in the name and behalf of the State of Georgia, such suits and legal proceedings as might be appropriate for removal of the encroachment and discontinuance of said use, provided, the Nashville, Chattanooga & St. Louis Railway should join therein and defray the expense thereof.

Record pps. 39 and 40.

Thereafter, on Jan'y 28th, 1920, the State of Georgia, as owner of the Western & Atlantic Railroad, and the Nashville, Chattanooga & St. Louis Railway, as lessee from the State of said railroad, operating the railroad under the name and style of Western & Atlantic Railroad, brought their petition in Equity against the Western Union Telegraph Company, alleging, in brief:

The State is the sole and exclusive owner of the Western & Atlantic Railroad, together with its rights of way and properties, extending from Atlanta, Georgia, to Chattanooga, Tennessee. Said railroad was constructed as a great public work by the State of Georgia solely out of public funds. All of the property appertaining to it, including its right of way and terminals, is exclusively owned by the State, directly and immediately in its sovereign and governmental capacity. It has never been incorporated, has no capital stock, nor does it constitute a legal entity. It is public property, the income therefrom constitutes a part of the public revenue and is, under the laws of the State, devoted to public uses.

The Nashville, Chattanooga & St. Louis Railway is a corporation of Tennessee and operates the Western & Atlantic Railroad under lease from the State of Georgia dated May 11, 1917, duly executed.

The defendant is maintaining and operating over, upon and along the right of way of the Western & Atlantic Railroad, between Atlanta and Chattanooga, telegraph lines, poles, wires, etc., such use and occupation being without authority from the State of Georgia, contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, as such lessee, and the same constitutes an unlawful encroachment upon said right of way and an adverse use thereof.

The continued use of such right of way by defendant is in derogation of the State's right and title thereto and operates adversely to the interests of its lessee, in the

full use and enjoyment of the right of way, and constitutes a continuing trespass and constantly recurring grievance.

The petition then set forth the Act of Nov. 30th, 1915, creating the Western & Atlantic Railroad Commission, and the amendment thereto of Aug. 4th, 1916, both hereinabove stated.

Also, paragraph 14 of the lease contract, also hereinabove stated.

Also, the resolution of the said Commission, also hereinabove stated; and alleged that this suit was brought in accordance with such authority and direction.

The petition prayed for decree declaring the defendant to be without lawful right or authority to use and occupy any portion of the right of way; and commanding it to desist from such use and occupation, to the end that the State and its lessee might enjoy the full and unrestricted use thereof, free from any adverse claim of right on the part of defendant; that defendant be enjoined from such use and occupation, entry upon or any act of trespass upon the right of way, and from disturbing or interfering with the unrestricted possession and use of said right of way by the State and its lessee; and that defendant be required, within reasonable time, to remove its wires, poles and structures from the right of way.

The defendant answered the petition, much of the answer being stricken on motion of plaintiffs.

Record pps. 74-78.

The contents of the answer to the petition, not stricken, briefly stated were:

It admitted the construction of the railroad, from Atlanta to Chattanooga, by the State of Georgia, and that the State is the owner of said railroad and of the easements or rights of way necessary therefor.

It admitted that the Nashville, Chattanooga & St. Louis Railway, under the terms of the Act of Nov. 30th, 1915, and the Acts amendatory thereof, became the lessee of said railroad; but it denied that said railway has acquired any right, title or interest in the lines of telegraph now owned by defendant, or in the easement and rights in land necessary therefor, and denied that said lines of telegraph and the easements and rights in land necessary therefor are included within or covered by the lease contract.

It admitted that the Western & Atlantic Railroad was until Dec. 27th, 1870 operated by the State of Georgia; that pursuant to the Act of Oct. 25th, 1870 the railroad was leased to a corporation known as the Western & Atlantic Railroad Company for a term of twenty years; that pursuant to the Act of Nov. 12th, 1889 it was leased for twenty years beginning Dec. 27th, 1890 to the Nashville, Chattanooga & St. Louis Railway, which by virtue of said Act and lease became a corporation under the name and style of the Western & Atlantic Railroad Company; and that pursuant to the Act of Nov. 30th, 1915

and amendments thereto it was leased for fifty years, beginning Dec. 27th, 1919 to the Nashville, Chattanooga & St. Louis Railway, which under the Act, as said lessee, became a corporation of Georgia under the name and style of Western & Atlantic Railroad.

It admitted that it is maintaining and operating, over, upon or along what is known as the right of way of the Western & Atlantic Railroad, between Atlanta and Chattanooga, telegraph lines, poles, wires and other appurtenances, describing the same.

It alleged that on Oct. 10th, 1850, Garst & Bean, who proposed to organize a corporation and build a telegraph line from Atlanta to Nashville, subsequently to extend to Augusta, made known such proposal to the Chief Engineer of the Western & Atlantic Railroad, and expressed a desire to procure the aid of said railroad in the construction of a line of telegraph by a corporation to be called the Augusta, Atlanta & Nashville Magnetic Telegraph Company; and that thereupon said Chief Engineer, W. L. Mitchell, on Oct. 11th, 1850 wrote to them a letter, copy of which was attached.

It alleged that by an Act of Jan. 27th, 1852, the State of Georgia incorporated the Augusta, Atlanta & Nashville Magnetic Telegraph Company, for doing business as a telegraph company, from Augusta, through Atlanta to Nashville, Tennessee, and by this Act expressly ratified and affirmed said contract entered into between said Chief Engineer and Garst and Bean on the part of said corporation; and further expressly enacted in said Act

that said corporation "shall have power and authority to set up their fixtures along and across any highroad or highroads; and any railroad which now or may hereafter belong to this State."

It alleged that under and by virtue of said last named contract and statute the first line of telegraph upon and along the Western & Atlantic Railroad was constructed and operated and that the Augusta, Atlanta & Nashville Magnetic Telegraph Company was thereby granted and acquired perpetual, irrevocable and assignable easements for the construction, maintenance and operation thereof.

It alleged that on Sept. 1st, 1858, Alvin D. Hammett conveyed to Wm. S. Morris et. al. all of the telegraph lines, properties and easements formerly belonging to said last named corporation and particularly those upon or along the Western & Atlantic Railroad from Atlanta to the dividing line between Georgia and Tennessee; and that on Nov. 13th, 1858 G. L. Willy conveyed to said Morris et al. all of the lines, properties and easements formerly belonging to said last named corporation, extending from Chattanooga, upon or along the Western & Atlantic Railroad, to the dividing line between Georgia and Tennessee; and that on Dec. 28th, 1859 said Morris et al. conveyed to the American Telegraph Company all of such lines, properties and easements, so acquired by them, extending from Chattanooga to Atlanta.

It is alleged that its use and occupation of the right of way of the Western & Atlantic Railroad was authorized and is lawful.

It admitted that such use and occupation was contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway; but alleged that any interference with and any removal of its lines of telegraph from the right of way, and any Georgia statute, law, judgment or decree so requiring, will deprive defendant of its lawful rights and properties, vested in and secured to it by the laws and constitutions of Georgia and of the United States, and will be unjust and inequitable to it.

It denied that plaintiffs, or either of them, had any right, title or interest in or to, or owned or were entitled to possession of said lines of telegraph and necessary easements; and alleged that on the contrary, it had exclusive right and title thereto and possession thereof, under lawful warrant; and it denied that it was a trespasser.

Record pps. 78-108.

In that portion of an amendment to its answer which was not stricken the defendant alleged that, because of the loss of original papers and the destruction of county records, during the Civil War, during the years 1861 and 1865 and the long lapse of time since that date, defendant is unable to attach copies of conveyances of the properties (rights of way) to A. D. Hammett or to George L. Willy, except certain exhibits attached.

These exhibits purported to be (1) a deed dated June 7, 1859, by the Sheriff of Richmond County, Georgia, (of which the City of Augusta is the County Seat, and

through which county the W. & A. R. R. does not extend), to A. D. Hammett, conveying to Hammett, in consideration of twenty dollars, all the wires, posts, insulators, etc., embracing every appurtenance belonging to the Augusta, Atlantic and Nashville Telegraph Company, in the limits of the County of Richmond.

The deed recited that the property was sold under an execution from the Superior Court of the County of Cobb, in favor of Camp & Hammett against said company.

Record p. 145.

(2) A deed by the Sheriff of DeKalb County, Georgia, (which county is not of those through which the Western & Atlantic Railroad extends) dated Jany. 4th, 1859, conveying to A. D. Hammett, in consideration of five dollars, all the property of the Augusta, Atlanta and Nashville Magnetic Telegraph Line situated in the County of DeKalb.

This deed recited that the property was sold under an execution from the Superior Court of Cobb County, issued "at the suit against the Augusta, Atlanta & Nashville Telegraph Company."

Record p. 146.

The defenses set up in the answer of the defendant and amendments thereto, which were stricken on motions of plaintiffs, briefly stated, were:

(1) A denial that the State of Georgia owned in fee simple any of the land in, through or over which the Western & Atlantic Railroad is constructed and operated.

(2) A denial that said railroad, including its right of way, is owned by said State in its sovereign or governmental capacity; and an allegation that the State, having embarked in the construction, maintenance and operation of a railroad, in doing so had waived, and "has always waived" its sovereign character in respect to the ownership, construction, maintenance and operation of said railroad.

(3) That the lines of telegraph upon, over and along the Western & Atlantic Railroad, or easements necessary therefor, had long previously to any of the above mentioned leases been, and, during the whole period of time covered by such leases, and up to the present time continued to be, possessed and owned exclusively and adversely by the defendant. That it has so owned, possessed and operated the same from the time it acquired the same about June 12th, 1866, and prior thereto its predecessors in title so owned, possessed and operated from the date of the first construction, about the year 1850.

(4) That by Act of Dec. 29th, 1847, the State of Georgia granted any company or individual the right to construct and operate lines of telegraph "upon any public road or highway in this State" and that the Western and Atlantic Railroad is a "public road or highway in this State" and is within the provisions of the Act.

(5) On information and belief, that during or about the year 1858 all of the lines, properties and easements of the last named corporation were sold, conveyed and delivered by it, or under levy and judicial sale, to A. D. Hammett and George L. Willy.

Conveyance on June 12th, 1866, by the American Telegraph Company to defendant of all the lines of telegraph, properties, easements and rights it possessed upon or along the right of way.

(6) By contract of Aug. 18th, 1870, between defendant and the Western & Atlantic Railroad, executed in behalf of the latter by its Superintendent and approved by the Governor of Georgia, the State of Georgia granted and conveyed to defendant a "perpetual right of way to erect and maintain telegraph lines along said railroad, of as many wires as it may deem necessary to its business and additional lines of poles whenever" defendant should so elect.

The preamble of this contract recited that it was entered into "in order to provide necessary facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. Tel. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations" between the parties.

By a resolution of Oct. 22nd, 1887, the General As-

sembly of Georgia requested the Governor to instruct the Attorney General to examine into the facts and circumstances of the said contract of Aug. 18th, 1870, and if it should appear that good grounds existed to to that end; notwithstanding which resolution no such action has ever been instituted, until the institution of the instant suit.

In any event the State is now barred by its laches and by the statutes of limitation from questioning the validity of said contract.

(7) Georgia statutes of limitation of actions for recovery of real estate and trespass upon or damages to real property, enacted in March, 1856.

(8) The extension by the State of Georgia of the Western & Atlantic Railroad into and in the State of Tennessee was not in the capacity of a sovereign, but only in the capacity of and with the rights of and subject to all the burdens and limitations imposed by law or equity upon a private person or ordinary railroad company, and subject to all the statutes of Tennessee relating to prescriptive title, to adverse possession, and to limitation upon the right to sue and such statutes were pleaded.

(Copy of said alleged statutes are on p. 121 of the Record).

(9) Prescription against the State and all others by adverse possession under color of title, by defendant and its predecessors in title, of the Garst & Bean contract and

the Act of the General Assembly of Georgia of Jan. 27th, 1852, by the other muniments of title above mentioned, and by the contract above mentioned, between the Western & Atlantic Railroad and the defendant of Aug. 18th, 1870.

(10) Art. 1, Sec. 8 of the Constitution of the United States, empowering Congress to regulate commerce between the States, and to establsh post roads.

The Act of Congress, enacted thereunder, of July 24, 1866, to aid in the construction of telegraph lines, etc., and the amendments thereto, and the written acceptance thereof by defendant on June 8th, 1867.

(11) The large cost and expense incurred by defendant in erecting and maintaining the telegraph line, and the loss defendant would sustain if any of the poles, wires, etc., should be removed from the Western & Atlantic Railroad and its right of way, besides the loss incident to the destruction of this link of defendant's system, and the effect thereof upon its good will and business; the cost and expense of the construction, maintenance and equipment, and that the lines along and upon said right of way were intended to and did become an important, permanent part of defendant's system, being well known to the State of Georgia and to the various lessees of the Western & Atlantic Railroad; and none of them having ever objected to such construction, maintenance, equipment and operation.

(12) Denial that the Western & Atlantic Railroad

Commission or that the Governor who executed the last lease of that railroad, had any authority to insert in the lease contract the provisions of paragraph 14 of said contract, and particularly in so far as such provision claims rights to the lines of telegraph and easements of defendant.

Denial that the lease Act of Nov. 30th, 1915, or any amendment thereof, empowered such Commission to adopt the resolution or give the direction under which the instant suit was brought, or to institute this suit or any proceeding; or to question or attack defendant's right to construct, maintain and operate its said lines, or to seek to annul or have adjudged ineffective the grants or permits given by Georgia to defendant and its predecessors in title; or to remove or interfere with defendant's said lines of telegraph or easements; or to prevent or defeat the performance by defendant of its obligations under or to deprive defendant of the rights, properties and franchses acquired by it under said Act of Congress and its amendments.

Defendant alleges, if the Georgia Act of Nov. 30th, 1915, or any amendment thereto, has the force and effect and delegates the authority herein above denied, but which defendant understands is claimed for it by complainants and by said Commissioners, then the statute is opposed to both the Constitutions of the United States and of the State of Georgia; and in any event said Act and the resolution of the Commissioners, and this suit, and any decree giving to the statute the effect herein

denied to it by defendant, but claimed in this suit by complainants, and any decree upholding or enforcing said resolution and any decree granting the prayers of the petition will be violative of said Constitutions, in that thereby

(a) There will be an impairment of the obligation of contracts by a statute or law passed subsequently which violates Art. 1, Sec. 3 par. 2 of the Georgia Constitution, and Art. 1, Sec. 10, Par. 1 of the Constitution of the United States.

(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities to defendant and its predecessors in such manner as to work injustice to defendant, which violates Georgia Constitution Art. 1, Sec. 3, Par. 3.

(c) The rights, privileges and immunities which as above alleged have vested in or accrued to defendant, under the Acts of the General Assembly of Georgia, will not be held inviolate by all courts before whom they may be brought in question, which violates Georgia Constitution Art. 12, Sec. 1, Par. 5.

(d) Thereby property of defendant will have been taken without due process of law, violating.

Georgia Constitution Art. 12, Sec. 1, Par. 5.
United States Constitution 14th Amendment.
United States Constitution 14th Amendment, Par. 1.

By those portions which were stricken of the amended answer of defendant, similar defences were made, the purport of which is suffciently above stated.

Exceptions to the rulings of the Court sustaining the motions to strike were duly made.

Among other things appearing in evidence on the trial of the cause were the following:

The admissions made by the defendant that the State of Georgia constructed the railroad out of public funds; and that the State is the owner of said railroad and the rights of way and easements necessary therefor.

Admission that the State operated the railroad until Dec. 27th, 1870.

Admission of the various Acts of the General Assembly authorizing leases of the railroad and of the lease contracts made thereunder.

Admission that defendant was maintaining and operating along the Western & Atlantic Railroad between Atlanta and Chattanooga, telegraph lines, poles, wires, etc.

In the year 1884, prior to the first lease of the railroad to the Nashville, Chattanooga & St. Louis Railway, a contract was made between the Western Union Telegraph Company and that railroad and other railroad companies, for themselves and any railroad that might

be acquired by them, respectively, either by lease or purchase, for the maintaining and operating telegraph lines of said telegraph company upon the lines of said railroads. This contract provided that it was to continue in force for twenty-five years from July 1, 1884, and thereafter until one year after written notice should be given by either party to the other of a desire and intention to terminate it. By virtue of this contract defendant maintained and operated its telegraph lines on the right of way of the Western & Atlantic Railroad from the time of the beginning of the first lease of that railroad to the Nashville, Chattanooga & St. Louis Railway in Dec. 1889 until, under notice given by the telegraph company, under the provisions of said contract of 1884, said contract last referred to expired on Aug. 17th, 1912.

On Jan. 18th, 1912 the telegraph company served notice on the Western & Atlantic Railroad Company (the corporate name under which the railroad was then operated by the Nashville, Chattanooga & St. Louis Railway, lessee) that the telegraph company "proposes and intends to acquire from you by condemnation * * * * along the right of way of your railroads in Georgia, a right of way upon which to construct (when necessary), maintain and operate its telegraph line. The location of the right of way sought to be acquired is substantially that location now occupied by the telegraph line of the Western Union Telegraph Company along main line of your railroad from Atlanta, Ga., to the Tennessee line."

"The Western Union Telegraph Company desires the above described right of way for the pur-

poses herein specified, for a term expiring 27th day of December, 1919, said date being the expiration of your lease with the State."

Admission by the defendant that the right of way sought to be condemned "is the property of the State of Georgia."

Allegation by defendant that it was necessary for it, in the carrying on of its business, to condemn that portion of the right of way set out in the notice of proposed condemnation.

On Aug. 5th, 1912 the Western & Atlantic Railroad Company notified defendant that on and after Aug. 17th, 1912, use and occupation by defendant of the right of way for a telegraph line would be against the will of the railroad Company; that the telegraph company was notified to vacate the right of way and complete the work of removal by Dec. 1st, 1912, but the latter did not begin such removal and still occupies along the right of way the locations it occupied before said notice was given.

After service upon it by the telegraph company of the condemnation notice above mentioned, the Western & Atlantic Railroad filed its petition in Equity, against the telegraph company, seeking to enjoin such condemnation, and the admissions above stated made by defendant were for the most part those contained in its answer to said petition for injunction.

After said petition for injunction was filed the defend-

ant telegraph company made a motion to advance the hearing of the cause.

In this motion, filed Feb. 7th, 1912, it alleged:

> "Defendant is now occupying with its line of telegraph a right of way on the railroad right of way of said petitioner under a contract which will expire August 17th, 1912.

Defendant shows that it is only six months until the contract under which it now occupies the right of way of said petitioner will expire, and that it is very important that the right of defendant to condemn said property, and if adjudged favorably to defendant, the condemnation proceedings in connection therewith, be had and determined by the expiration of said time."

Injunction having been denied by the lower Court the railroad company took writ of error to the Supreme Court of Georgia. That Court reversed the decision of the lower Court, holding, among other things, that a telegraph company could not construct a line of telegraph over the land of the State without permission of the State, and that the Code of Georgia did not grant that permission except upon due compensation.

> Western & Atlantic Railroad Company vs. Western Union Telegraph Company, 138 Ga. 420.

Thereafter, on Dec. 9th, 1912 the telegraph company served upon the railroad company, what the former styled an amendment to its condemnation notice and the

railroad company, by amendment to its petition in Equity above mentioned, sought to enjoin the proposed condemnation.

In August, 1912, after the decision of the Supreme Court of Georgia above noted, the telegraph company served upon the Governor of Georgia what purported to be a notice to the State that the former desired to acquire a right of way upon which to maintain and operate a telegraph line on the lands composing the right of way of the W. & A. R. R., the property of said State," for a perpetual term, making an offer of a certain sum for the right of way and stating that unless the offer were accepted by a certain time proceedings to condemn would be instituted.

The State of Georgia thereupon filed its petition in Equity to enjoin the proposed condemnation.

Injunction was granted by the lower Court to the railroad company and the State.

The telegraph company took those cases to the Supreme Court of Georgia, which affirmed the decisions.

> Western Union Telegraph Company vs. Western & Atlantic Railroad Company, 142 Ga. 532.
>
> Western Union Telegraph Company vs. State of Georgia, 142 Ga. 535.

Both these cases were decided Sept. 30th, 1914.

In them it was held, that the statute providing for the condemnation of property for public use was applicable only to privately owned property, and not to property owned by the State.

Further, that as the usufructuary interest of the lessee of the railroad belonging to the State was not subject to condemnation as an independent estate or interest in land, and as no legislative provision was made for condemning the State's property, grant of injunction was not erroneous.

Upon the trial of the instant case there was evidence further, among other things, tending to show that the location of the telegraph lines in question interfered with the operation of wrecking machines and cranes, clearing up wrecks; that wires and poles in sleet storms fell on the railroad tracks; that it is a very great inconvenience, and burden upon the operating department of the railroad to have a line of poles, with wires and cross arms occupying any part of the right of way, especially if the men who are to maintain the telegraph line are not under the orders of the Superintendent of that division, because it is at many points in close proximity to the track and interferes with a number of operations.

The jury in the instant case found, among other things, that the State was the sole and exclusive owner of the right of way of the Western & Atlantic Railroad from Atlanta, Ga., to Chattanooga, Tenn., in its sovereign or governmental capacity; that defendant was maintaining and operating over, along and upon said right of way,

telegraph lines, poles, etc., without authority from the State or the lessee, the same being an unlawful encroachment on said right of way and an adverse use thereof; and that defendant should remove its property from the right of way within twelve months from the date of the verdict, the same being a reasonable time.

Decree was entered in accordance with the verdict.

Defendant's motion for a new trial was overruled and it took the cause to the Supreme Court of Georgia.

At the motion for new trial contained more than one hundred grounds, a statement of them is not made here. The nature of all of them, so far as seems material now, has been sufficiently indicated by what is above stated or will be so indicated hereinafter.

The Supreme Court of Georgia, being composed of six Justices, the decision of the lower Court was affirmed by an equally divided number of justices.

> Western Union Tel. Co. vs State of Georgia et al., 156 Ga. 409.

Those justices who were in favor of affirmance held:

> "The State of Georgia in its sovereign capacity is the owner of the Western & Atlantic Railroad and the right of way upon which it is constructed. Section 6 of the Act of 1852, the caption of which is 'An Act to incorporate the Augusta, Atlanta and Nashville Magnetic Telegraph Company', is

void, because it violates the clause of the constitution of 1798 which provides: 'Nor shall any law or ordinance pass, containing matter different from what is expressed in the title thereof'."

Under the doctrine of *nullum tempus occurrit regi*, adverse possession as against the State of Georgia cannot provide the basis for a prescriptive title; and the State is not affected by a statute of limitations unless it expressly consents to be held subject thereto."

"Under the facts of this case a title by prescription could not be ripened by the possession of the predecessor in title of the plaintiff in error within the period of time when the State may be held to have waived the operation of the statute of limitations."

"The plea of laches is not available as against a sovereign State. The State cannot be guilty of negligence or any other similar act involving the omission to perform a duty devolving upon an ordinary citizen."

"The sale to Hammett did not convey anything but personalty."

Those justices who were for reversal, were of opinion that the Act of 1852 was constitutional and together with the Garst & Bean contract above mentioned, had the effect of granting to the telegraph company the franchise

which permitted it to maintain and operate a telgraph line over the right of way; and that defendant should have been allowed to deraign its title under successive conveyances from the Magnetic Telegraph Company to itself.

These justices concurred with the other justices upon the question as to whether or not prescription would ripen against the State, or the lapse of time could be made the basis of prescription, and as to whether the State lost its right to assert title to any part of its right of way by laches.

Defendant moved for a rehearing, which was denied.

It thereupon brought the case to this Court by writ of error; and, also, filed its petition for certiorari.

I.

IMPAIRMENT OF OBLIGATION OF CONTRACTS BY LEASE OF THE WESTERN & ATLANTIC RAILROAD, BY ACTS PROVIDING FOR SUCH LEASE AND BY RESOLUTION OF THE WESTERN & ATLANTIC RAILROAD COMMISSION.

The Western & Atlantic Railroad, being the property of the State of Georgia that State, of course, had the right to lease the same.

The original Act providing for the lease, (Act of Nov. 30, 1915, Record pps. 220-222), contains nothing which

could impair the obligation of any valid contract previously made by the state.

It creates a commission to determine the terms and conditions upon which the lease should be made.

It provides that, among other duties, the commission should consider and determine what steps, if any, should be taken to assert the title of the State to any part of the right of way that may be adversely used and occupied; and should prepare, so that the same might be presented to the General Assembly, bills carrying into effect any recommendation it might make with respect to what steps should be taken to assert the right and title of the State to any part of the road that might be adversely used or occupied.

Surely there is nothing in this Act which in any way impairs the obligation of any valid contract theretofore made.

It provides that what belonged to the State should be leased and that inquiry and report should be made to what part of the property of the State, if any, was adversely used and occupied. No authority is given to lease anything not the property of the State of Georgia.

The Act of Aug. 4, 1916, amendatory of the last above named Act (Record pps. 230-231), empowered the Commission to deal with and dispose of encroachments upon and uses and occupancies of any part of the right of way by any person other than the then lessee, whether the

encroachment, use, or occupancy be permissive or adverse, and whether with or without claim of right therefor; to determine whether such encroachments, uses and occupancies should be removed and discontinued, or permitted to remain, and, if so, to what extent and upon what terms; to adjust and dispose of all controversises that might exist or arise with respect to adverse uses or occupancies; and to take such action as it might deem proper to cause the removal and discontinuance of any encroachment, use or occupancy, and to this end "*to institute and prosecute * * * such suits and other legal proceedings as it might deem appropriate of the State's interests, or the assertion of the State's title.*" (Italics ours.)

An unbiased examination of this Act must result in the conclusion that its purpose was to empower the Commission to examine into what uses and occupancies there were; what were deemed by it, as the result of such examination, unauthorized; whether steps should be taken to remove unauthorized occupancies; to make adjustments as to such as could be adjusted, without litigation; and, as to such as could not be adjusted, to institute suits and other legal proceedings as it might deem appropriate in protection of the State's interest, or assertion of the State's title.

Surely the obligation of a contract is not impaired by an Act providing for enquiry as to whether such a contract exists and whether it is a valid and binding contract, and authorizing the testing of these questions by a suit.

The lease contract, (Record pps. 222-230), covered

"the said W. & A. R. R., a railroad running from the City of Atlanta * * * to the City of Chattanooga * * *, together with all its houses, work shops, rolling stock, depots and appurtenances of every kind and character, belonging and appertaining to said railroad," with certain exceptions not here important.

This contract, neither in letter or spirit, was intended to cover or does cover anything not the property of the State of Georgia. As to those portions of the property which did belong to the State but which were adversely used or occupied it reserved to the State the right to withhold delivery of them to the lessee, proceed to remove them in such manner at it might deem best, and, if suit became necessary, it provided that such suit should be brought by the State and joined in by the lessee, should the lessee be so requested.

In other words the State, if and when it saw proper, was to examine into what, if any, part of the property was adversely used, remove the encroachments in any lawful way short of suit, as it might deem proper, and if it became necessary to sue, bring suit, should it be so disposed, in which suit the lessee should join.

How this can be held to fall within the inhibition of the Constitution, forbidding any State to pass any "law impairing the obligation of contracts," is not apparent. The question as to whether there was a valid contract, existing when the lease was made, was not foreclosed nor could it be by the lease Act or the lease contract. Any right of any party to pre-existing contracts was not im-

paired. A "day in court" was contemplated in case of disputes not otherwise adjusted, and, certainly, a "day in court" has been had by the plaintiff in the instant case.

It is complained that the resolution of the Western & Atlantic Railroad Commission, authorizing and directing the institution of the instant suit, (Record p. 39) itself impairs the obligation of contracts.

Is it possible that direction to institute a suit to determine whether or not adverse occupation of a right of way is lawful, can be held to fall within the inhibition of the Constitution?

It is to be noted that, upon the trial of the case, the jury was instructed that recitals in this resolution, as to what had been represented to the Commission, were not admitted as evidence to prove the truth of what was so represented but only as a statement that such representations had been made to the Commission.

(Record p. 232).

(1). Even if it could possibly be held, and we cannot see how it could be so held, that such legislative acts or the contract of lease, might impair the obligation of a valid contract, there was no valid contract between the State of Georgia and the Western Union Telegraph Company, or its predecessors in title.

Two alleged contracts are relied upon by the Telegraph Company:

(a) Contract springing out of the correspondence of 1850 between Wm. Mitchell, Superintendent of the Western & Atlantic Railroad, and Garst and Bean, as ratified by the Act of the General Assembly of Georgia of 1852, for the incorporation of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, accompanied by grant of privileges in such Act.

(b) Contract of 1870 between the Superintendent of the Western & Atlantic Railroad, and the Western Union Telegraph Copany, approved by the Governor of Georgia.

As to the first of these alleged contracts:

It is evident that Garst & Bean and those persons promoting the incorporation of the Augusta, Atlanta & Nashville Megnetic Telegraph Company did not believe that Mitchell, Superintendent of the W. & A. R. R., though his action were approved by the Governor of the State, could sell or bargain away the right of way of the railroad or important easements thereon, because they undertook to have such bargain ratified by the General Assembly of Georgia.

In believing that legislative grant or ratification was necessary they were right.

No authority had been given to any one to part with the right of way, or to give, grant or contract for an easement therein or thereon, with any one. That right of way was most jealously guarded and nothing but express

gislative authority could authorize the granting of the asement claimed. No grant could be *presumed* where gislative grant was necessary.

"Powers of all public officers are defined by law, and ll persons must take notice thereof. The public cannot e estopped by the acts of any officer done in the exer-ise of a power not conferred."

Code of Georgia of 1910, Sec. 303.

"The Attorney General had no power to make any such contract or compromise, or to release the Company from any part of the ad valorem tax imposed."

State of Georgia vs South Western Railway, 70 Ga. 12.

"Nor would the Governor have power to make any such contract or release; he could not do more than suspend the collection of the tax until the meeting of the next General Assembly."

Ibid.

"No officer of the Western & Atlantic Railroad could, by any agreement or negotiation with the purchaser, made without authority of law, bind the State. No such authority was shown giving power to such officer to make admissions recognizing title out of the State, nor does the mere fact that complainant, or any one under whom she

claims, did, by the acquiescence of such officer, hold possession for awhile, or exercise dominion over a portion of the right of way, affect the State, so far as they concern the ascertainment of the true boundary thereof, or the right and title of the State to the same * * *. No acts or agreement with unauthorized officers of the State could take either away. No statute of limitation or prescription ran against the State so as to be a bar."

Dougherty vs W. & A. R. R., 53 Ga. 304, 314.

"The Governor had no power to compromise a claim due the State by the defendant on account of negligent escapes."

Penitentiary Co. No. 2 vs. Gordon, Governor, 85 Ga. 159.

"All persons dealing with a public officer must at their peril ascertain the extent of his authority, and one who claims title through the act of such an officer is bound to see that his powers were adequate to the transaction undertaken. The State cannot be estopped by the acts of any of its officers, done in the exercise of a power not conferred upon them, any more than it can be bound by contracts made by its officers which they were not empowered to make. The powers of all officers are defined and conferred by law, and of these all persons who deal with them must take notice. Acts done in excess of the power conferred are not official acts.

Id. p. 171.

"The Governor has no right to contract away the State's property at his pleasure or discretion. It is his duty to protect the property of the State, but he is not given any authority to sell the State's property, or to contract with reference thereto. * * * * But no power conferred upon the Governor by the Code authorizes his consent to the sale of any property of the State, *or any easement or interest* in the State's property. The power to dispose of property belonging to the State is vested in the legislature. 36 Cyc. 870. And the Governor would have no right to usurp the legislative function in the matter of contracting away the State's property, or any interest therein." (Italics ours).

Western Union Tel. Co. vs W. & A. R. R. Co., 142 Ga. 532, 534.

The language quoted last above is taken from the opinion of the Supreme Court of Georgia, in the case in which the telegraph company, sought to condemn the very right of way in question in the instant case and in which it asserted, (recognizing that it had no title), that it was necessary for it to acquire the same by condemnation.

From the time of the institution of such condemnation proceeding in 1911 up to the present time the telegraph company has been occupying this same right of way, despite the efforts of the State to have it cease such occupancy.

But it now claims that though the alleged contract with Garst and Bean were not binding upon the State, because without the authority of Mitchell, Superintendent of the railroad, the contract was ratified and perpetual, assignable power to occupy the right of way, was given to the Augusta, Atlanta & Nashville Magnetic Telegraph Company by Act of the General Assembly of Georgia of 1852.

But that Act was unconstitutional, because in conflict with the Constitution of Georgia of force when the Act was passed.

> Western Union Telegraph Co. vs State of Georgia et al, 156 Ga. 409, *Supra.*

This decision was made in the instant case, affirming the decision in the lower court.

An effort has been made to attack this holding, by motion for rehearing, upon the alleged ground that it was in conflict with other decisions of the Supreme Court of Georgia, but the motion for a rehearing was denied.

The Supreme Court of Georgia but followed a long line of decisions of that Court, going back certainly as far as the case of Mayor of Savannah vs State, 4 Ga. 28, decided in 1848, which was followed in Prothro vs Orr, 12 Ga. 36, decided in 1852.

In the latter case it was held:

"The 5th Section of the Act of 1809 and the 3rd

Section of the Act of 1823 declared to be unconstitutional and void, on the ground that they contain matter *different* from what is expressed in the titles of the Acts to which they respectively belong." In the same case it was said: "It is a common practice to pass bills by their title only, without requiring them to be read in their progress through each branch of the General Assembly. To prevent fraud and surprise, how important it is that the members should be notified at least by the *title* of the act. of the subject matter about which they are legislating."

To the same effect see

Mayor of Macon vs Hughes, 110 Ga. 795, 797-804.

Banks vs State, 124 Ga. 16.
Bass vs Lawrence, 124 Ga. 75, 76.

In the latter case it is said, p. 76:

"In the Mayor of Macon vs Hughes, 110 Ga. 795, after an elaborate collection and examination of the previous adjudications of this Court, it was held that where the title of an Act specifies some of the objects for which the statute was passed and contains the general expression 'and for other purposes,' any legislation could constitutionally be embodied in the body of the Act which was germane to the general subject expressed in the title."

The same ruling had been made in Martin vs Broach, 6 Ga. 21, 27, decided in 1849.

The title of the Act of 1852 to incorporate the Aug., Atlanta & Nashville Mag. Tel. Co., did not contain any such general expression.

It is urged by plaintiff in error that the decision in the instant case on the question of the constitutionality of the Act of 1852 is opposed to some other decisions of the Supreme Court of Georgia.

Conceding, for the sake of argument only, that this be true, the decision of the Supreme Court of Georgia, in the instant case in holding said Act unconstitutional will be upheld by this Court.

> "The parties to this action have been fully heard in the State Court in the regular course of judicial proceedings, and in such a case the mere fact that the State Court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law."
>
> Tidal Oil Co. vs Flanagan, 263 U. S. 444, 450.

> "It has been settled by a long line of decisions that the provisions of Sec. 10, Article 1 of the Federal Constitution, protecting the obligation of contracts against State action is directed only against impairment by legislation, and not by the judgments of courts."
>
> Ibid.

By the amendment of Feb. 17, 1922 to Sec. 237 of the Judicial Code it was provided:

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest Court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest Court of a State in which a decision in the suit could be had, if said claim is made in said Court at any time before said final judgment is entered and if the decision is against the claim so made."

In commenting on this amendment, in the opinion in the above stated case, it is said:

> "Counsel say: * * * * 'Evidently the amendment of Feb. 17, 1922 to Sec. 237 of the Judicial Code was for the express purpose of extending the appellate jurisdiction of this Court to cover cases involving the impairment of contract obligations by change of judicial decision in the construction of applicable statutes. This is the plain language of the Act.'
>
> The intention of Congress was not, we think, to add to the general appellate jurisdiction of this Court existing under prior legislation, but rather to permit a review on writ of error in a particular

class of cases in which the defeated party claims that his Federal Constitutional rights have been violated by the judgment of the State Court itself, and further to permit the raising of the objection after the handling down of the opinion. * * * This Act was intended to secure to the defeated party the right to raise the question here if the State Court denied the petition for rehearing without opinion.

We cannot assume that Congress attempted to give to this Court appellate jurisdiction beyond the judicial power accorded to the United States by the constitution. The mere reversal by a State Court of its previous decision, as in this case before us, does not, as we have seen, violate any clause of the Federal Constitution. Plaintiffs' claim therefore does not raise a substantial Federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction."

Ibid.

"In Tidal Oil Co. vs Flanagan, decided Jan. 7, 1924, we had occasion to consider the same issue. After a somewhat full examination, we held that, by a score of decisions of this Court, a judicial impairment of a contract obligation was not within Sec. 10, Article 1, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no Federal question of which this Court would

take jurisdiction on a writ of error from a State Court."

Fleming et al. vs Fleming, 264 U. S. 29, 31.

"The question whether or not a State statute conflicts with the Constitution of the State is settled by the decision of its highest Court. Carstairs vs Cochran, 193 U. S. 10, 16. This Court 'is without authority to review and revise the construction affixed to a State statute as to a State matter by the Court of last resort of the State.' Quong Ham Wah Co. vs Industrial Acc. Commission, 255 U. S. 448, and cases cited."

Terrace et al vs Thompson, 263 U. S. 187, 224.

"The Act, it is true, as recognized by the Supreme Court of Georgia in the instant case, does not require the board of assessors to give any notice to the tax payer, or grant him a hearing, before assessing the value of the property. Turner vs Wade, Supra, p. 70. It does not, however, make this assessment by the board final and conclusive against the tax payer. * * * * * The construction of the Act by the highest Court of the State is to be accepted by this Court. Farncomb vs Denver, 252 U. S. 7, 10."

McGregor vs Hogan, 263 U. S. 234, 236.

Whether a contract was a valid one under the laws of a State belongs to the Supreme Court of the State to decide.

City of Opelika vs Opelika Sewer Co., 265 U. S. 215.

"We are asked to go into the proper construction of the State statute and its validity under the State Constitution. But these are questions of local law, the decision of which by the Supreme Court of the State is controlling."

Des Moines Nat. Bank vs Fairwether, and authorities cited, 263 U. S. 103, 105.

Also, Puget Sound Power Co. vs County of King, 263 U. S. 22, 27.

"Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest Court of the State, fixing the meaning of the state legislation as though such meaning had been specifically expressed therein. See, for example, Leffingwell vs Warren, 2 Black. 599, 603; Green vs Neal, 6 Pet. 291, 297-300. And we follow the State construction even though it may not agree with our own opinion. Carroll County vs United States, 18 Wall 71, 82; Shelby vs Guy, 11 Wheat. 361, 367; Tioga R. Co. vs Blossburg & C. R. Co. 20 Wall 137, 143."

Knights of Pythias vs Meyer, 265 U. S. 30.

Legislative not judicial action, is what is forbidden by

the prohibition in United States Constitution, Art. 1, Sec. 10, against impairing obligation of contracts.

McCoy vs Union Elc. R. Co. 247 U. S. 354.

Whether a State statute did or did not validate a contract theretofore unenforceable is a question for the State courts to decide, and their decision is not subject to review in the Federal Supreme Court.

Munday vs Wisconsin Trust Co. 252 U. S. 499.

The contract clause of the Federal Constitution applies only to legislation subsequent in time to the contract alleged to have been impaired.

Ibid.

The contract clause of the Federal Constitution cannot be invoked against a change of decision by a State court.

National & Assn. vs Braham, 193 U. S. 635.

"Where the Federal question upon which the jurisdiction of this Court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, so as to give this Court jurisdiction on writ of error to a State court, by some subsequent statute of the State which has been upheld or effect given to it by the State Court."

Bacon vs Texas, 163 U. S. 207.

A purchaser of county bonds issued in aid of a railroad, under the supposed authority of the Act incorporating the road, which is subsequently held unconstitutional by the State courts because the provisions for the transfer to the railroad company of municipal subscriptions in and of another railroad were not within its title, has no contract rights protected by the Federal Constitution against impairment because the purchase was made on the faith of prior decisions that municipal subscriptions to railroad stock were so germane to railroad incorporation as not to require specific mention in the title of an Act providing for the incorporation of a railroad.

Zane vs County of Hamilton, 189 U. S. 370.

Denial by a city in an ordinance, of its obligation to make payments under a contract and declaration in such ordinance that it would not make such payments in the future do not fall within the inhibition of the Federal Constitution against impairment of the obligation of contracts.

St. Paul Gas Light Co. vs City of St. Paul, 181 U. S. 142, 149.

"We are not authorized by the judiciary Act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State could be brought here where the party setting up a contract alleged that

the court had taken a different view of its obligation to that which he held."

Knox vs Exchange Bank, 79 U. S. 379, 383.

To similar effect:

Lehigh Water Co. vs Easton, 121 U. S. 388, 392. "It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Commercial Bank vs Buckingham, 46 U. S. 317, 343.

"As this Court has repeatedly ruled, the Constitution affords no protection as against an impairment by judicial decision."

"But although the State Court may have construed the contract and placed its decision upon its own construction, if it appear upon examination that in real substance and effect force has been given to the statute complained of our jurisdiction attaches."

Columbia Railway, Gas & Electric Co. vs South Carolina, 261 U. S. 236.

The decision in this last cited case is that mainly relied upon by the telegraph company, the latter asserting that such effect has been given to the Georgia acts of 1915 and 1916, by the rulings of the Georgia Courts as to bring its alleged contracts of 1852 and 1870 within the Constitutional protection. But the instant case differs widely from that of the Columbia & Company vs South Carolina, Supra. In the latter case the Act there in question (Act of 1917) expressly declared that the terms of the particular contract involved had not been complied with, that by reason thereof the rights and interest of the defendant had been forfeited and reverted to the State and the Attorney General and other officers were directed to make re-entry within a certain time. The courts of South Carolina gave effect to this Act, not simply as one authorizing a judicial proceeding, but held that, coupled with a demand and refusal, it was *equivalent to the exercise of the right of re-entry,* that the declaration in the Act that there had been a failure to perform the conditions of the contract was entitled to some respect, though the court was not thereby prevented from inquiring whether such declaration was true; and held, further, that the Act was binding upon the Court under the evidence. In the instant case force has not been given, in real substance and effect to the Acts of 1915 and 1916, and those Acts in no way impair the obligation of any contract. Nothing more was done by the Georgia Court as to said Acts, than to recognize the plaintiffs below as proper parties plaintiff to assert whatever rights the State of Georgia, or its lessee, might have to the possession of the right of way.

The decisions in Mayor or &c, of Savannah vs State, 4 Ga. 26, *Supra*, and Martin vs Broach, 6 Ga. 21, 27 *Supra*, are both decisions of the Supreme Court of Georgia made before the passage of the Act of 1852 to charter the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

How then can it be said that the obligation of the contract has been impaired by a change of construction of the Georgia constitution of 1798 from that prevailing when the Act of 1852 was passed?

Will the Supreme Court of the United States, should it happen to differ from the Supreme Court of Georgia, say that an Act of the Legislature of Georgia was in accordance with the Georgia constitution when the Supreme Court of Georgia has said that it was not, and hence reverse the decision of the State Supreme Court?

The decision attacked was that of the Supreme Court of Georgia. It was made by three Justices of that Court affirming the decision of the Judge of the Superior Court. The Judge who rendered the contrary opinion, holding the Act constitutional, was himself a Judge of the Superior Court, and his view was concurred in by only two of the Supreme Court Justices.

The two decisions above cited constituted a plain and solemn warning that acts of the Legislature must conform to the constitution and must, by their title, indicate what were their contents. We insist, if it be a matter which the Supreme Court of the United States will un-

dertake to pass upon, that the title of an act being merely to incorporate a certain company, said title does not indicate that the act contains a ratification of a contract made two years before between an engineer of the State's railroad and promoters of the corporation, granting an important easement out of the right of way of that railroad, claimed to be a perpetual and assignable easement; nor does such title indicate that the act contains a grant to the corporation of such easement coupled with participation by an officer of the State in the management of the affairs of the corporation and the taking of stock in the corporation by the State, substituting dividends or anticipate dividends for interest on money due the State.

Among the cases referred to and considered in Mayor &c vs Hughes, 110 Ga. 795 were those of Mayor of Savannah vs Commissioners, 4 Ga. 26, 38, *supra*, and Protho vs Orr, 12 Ga. 36, *supra*, and Martin vs Broach, 6 Ga. 21, *supra*, in which it was said that "Where the title specifies some of the objects for which the statute was passed and contains this general clause—'and for other purposes therein contained' portions of the Act not specially indicated in the title, are, nevertheless, good, under this general clause."

> To similar effect Black et al vs Cohen, 52 Ga. 621, 626.

In Butner vs Boifeuillet, 100 Ga. 752 it was said:

> "Different opinions may prevail elsewhere as to the value of these words as descriptive terms in

> the title of an Act of the General Assembly; they have in this State a fixed legal significance, and the courts in passing upon the constitutionality of the Acts of the General Assembly are not authorized to disregard it. * * * * * There has been no substantial departure from this construction of the constitutional provision in question and it was distinctly recognized and reaffirmed in the case of Black vs Cohen, 52 Ga. 621 as well as in numerous other cases which it is not necessary here to cite."

As to the use of these words it was said in the opinion in Martin vs Broach, 6 Ga. 21, *supra*, "This was sufficient to prevent surprise—to induce the members, either to call for the reading of the *whole* of the bill, or to look into it, during its progress through the legislature."

In Bass vs Lawrence, 124 Ga. 76, *supra*, it was said:

"If the words 'and for other purposes,' had been omitted, the matter in the body of the Act would be limited by the caption; the whole of the Act would not be void, but that portion of the body of the Act to which no reference was made in the title would fail."

This decision was made after that in Bonner vs Milledgeville Ry. Co., 123 Ga. 115, cited for plaintiff in error, and was based on earlier unanimous decisions of the Supreme Court of Georgia.

And in the Bonner case, though the holding seems to go far, the title of the Act did contain the saving words "and for other purposes," which words were not in the

title of the Act of 1852 to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

Certainly it can be said, as was said in Bucher vs Cheshire R. R. Co., 125 U. S. 555, that the decisions on this subject by the Georgia Court are numerous enough and of sufficiently long standing to establish the rule as the law of that State on the subject.

The decision of this Court in Wade vs Travis County, 174 U. S. 499, 508 is not applicable here since there has been no later case in Georgia overruling the earlier decisions, and, according to the law of that State, the earlier decisions, when not overruled, have the force of law.

And Muhlker vs New York & Harlem R. R. Co., 187 U. S. 544, is obviously not applicable since no rights of Garst & Bean or of the Augusta, Atlanta & Nashville Magnetic Telegraph Company were obtained because of or based upon prior decisions of the Supreme Court of Georgia. We invite attention to the fact that the decision in the case last cited was concurred in by Mr. Justice Brown only as to the result, and to the dissenting opinion of Mr. Justice Holmes, concurred in by the Chief Justice, Mr. Justice White, and Mr. Justice Peckham.

In Stearns vs Minnesota, 179 U. S. 223, it is said: "This court has always held that the competency of a State through its legislation to make an alleged contract and the meaning and validity of such contract, are matters which in discharging its duty under the Federal constitution it must determine for itself."

Mr. Justice Brown concurred in the decision in that case upon the ground "that the legality of commuting the payment of taxes upon railway property by a payment of a percentage upon the gross earnings, having been recognized by the legislature and the Supreme Court of Minnesota for thirty years, and also having been recognized as valid in the constitutional amendment of 1871, it is too late to set up its repugnance to the State constitution as against railways which were built upon the faith of its validity."

In the dissenting opinion of Mr. Justice White, concurred in by three other Justices, it was said: "It follows then, that if the gross receipt tax was an exemption it was void, because repugnant to the constitution of the State. If so void, it did not create a contract, within the contract clause of the constitution of the United States, for rights protected from impairment could not flow from an Act which had no legal existence."

AS TO GEORGIA DECISIONS CITED FOR PLAINTIFF IN ERROR ON THE CONSTUTIONALITY OF THE ACT OF 1852.

In Hope vs Mayor &c of Gainesville, 72 Ga. 646, the title of the Act contained the words "and for other purposes." The same is true in Bonner vs Milledgeville, 123 Ga. 115. Also in Plumb vs Christie, 103 Ga. 700, though not appearing in the report. In Wellborn vs State, 114 Ga. 793 the title of the Act contained the words "and for other purposes," and this is expressly referred to as

authority for the decision (pps. 815, 817) under the ruling in Mayor vs Hughes, 110 Ga. 795, *Supra.*

In Churchill vs Walker, 68 Ga. 681, the title contained the words "and for other purposes." The same is true as to Peed vs McCrory, 94 Ga. 487, Black vs Cohen, 52 Ga. 621, Forkas vs Smith, 147 Ga. 503 and Lloyd vs Richardson, 158 Ga. 633.

Not one of these cases was decided before 1852.

In the case mainly relied upon, Goldsmith vs Rome R. R. Co., 62 Ga. 478-9, it is expressly said:

> "In the cases before our Supreme Court in which they have held statutes to be unconstitutional because they contained 'matter different from what was expressed in the title' the court has also held that if the title of the Acts had been general, or if the title, after designating a particular object, had added 'and for other purposes' the construction would have been different."

As to the second of these alleged contracts, to wit the contract of 1870, made by Blodgett, Superintendent of the Western & Atlantic Railroad, (with the approval of Bullock, Governor), with the Western Union Telegraph Company, what has been above said as to the Garst and Bean contract is applicable.

There being no power in Blodgett, Superintendent, either with or without the approval of the Governor, to

bind the State by such a contract, without express legislative authority or ratification, and no such legislative authority or ratification having been granted or made, there was no contract.

II.

CLAIMS MADE BY DEFENDANT IN ERROR UNDER A GENERAL STATUTE OF THE STATE OF GEORGIA OF DEC. 29TH, 1847

On Dec. 29, 1847 the General Assembly of Georgia passed an Act with the following title:

> "An Act to Authorize the Construction of the Magnetic Telegraph and Providing for the Protection of the Same."

This Act was as follows:

> "Whereas, many of the citizens of the State of Georgia are interested in the construction of lines of the Magnetic Telegraph, and desire the protection of their property, and the privilege of using the public roads and highways for their posts and wires."
>
> "Sec. 1. Be it enacted, That any company or individual may erect posts and wires, and other fixtures for telegraphic purposes, on or by the side of any public road or highway in this State: Provided that such posts, wires or fixtures shall in no

case be so set or placed as to obstruct, hinder, or in any way interfere with the common uses or business of said roads or highways."

Record p. 36.

It is claimed by defendant in error that this Act was a grant of easements for telegraph lines by the State of Georgia, and that, in some way, not made clear, the decision of the Supreme Court of Georgia, impaired the obligation of a contract arising out of this grant.

It is evident that neither the Western Union Telegraph Company nor any of its predecessors constructed any line of telegraph on the right of way of the Western & Atlantic Railroad under or because of this Act. No such claim was made in the Court below.

The Act itself contains no reference to the right of way of any railroad and was evidently meant to refer to "public roads" according to the ordinary interpretation of those words.

Of course this statute did not mean that a company or an individual could enter upon the right of way of the railroads in Georgia and appropriate it or any part of it without consent and compensation. Such a statute would have been unconstitutional. In fact a later statute, that of Aug. 26, 1872, was declared unconstitutional by the Supreme Court of Georgia because it provided for condemnation of railroad rights of way for telegraph lines, without providing means of enforcing the award or for an appeal from the award of arbitrators.

"The Act of the General Assembly of Georgia, approved August 26th, 1872, entitled 'An Act to empower and authorize telegraph companies in this State to construct their lines upon the right of way of the several railroads in this State, is unconstitutional and void, for the reason that it fails to provide any compulsory process for the enforcement of the payment of just compensation for private property taken under its provisions."

South Western R. R. Co. vs S. & A. Tel Co. 46 Ga. 43.

The State of Alabama had a statute in which was used language similar to that of the Georgia Act of Dec. 29, 1847, and in that State the Western Union Telegraph Co. made claims under it similar to the claim it makes in the instant case.

As to such claims the Supreme Court of Alabama held:

"As the ultimate owner of the beneficiary interests in the public roads of the State, the legislature doubtless had the power to make such a grant as to the margin of public roads; but as the right of way of a railroad is private property no such power would seem to exist, for it would infringe upon the constitutional provisions. The location of said Section 5817 in the Code, and its terms granting an unconditional and free right to use the margins of public highways, tend clearly to show that by 'public highways' is meant public roads. We are of

the opinion that the language of that statute has no application to the right of way of a railroad. While railroads are denominated public highways, yet they are such in a more or less limited sense, such as to be within State and Federal control; but are not public highways in the general sense, such as would permit their use by the public, as in the case of public roads."

Citing and quoting from Western Un. Tel. Co. vs P. R. R. 195 U. S. 573.

L. & N. R. R. Co. vs Western Union Tel. Co. 195 Ala. 124.

III.

TITLE, RIGHT, PRIVILEGE OR IMMUNITY CLAIMED UNDER THE CONSTITUTION OR STATUTE OF THE UNITED STATES NOT DENIED.

In a very general and sweeping assignment of error (pps. 55-69 of the record) the plaintiff in error apparently undertakes to cover all the defenses made by it in the Court below, as though none of them had been finally settled and disposed of in that court.

Many of the questions sought to be made by the mass of verbiage employed have been already herein considered.

Again, as to the Act of 1915 for the lease of the Western & Atlantic Railroad, and the Act of 1916 amendatory

thereof and the resolution of the Western & Atlantic Railroad Commission, permit us to say:

Surely the plaintiff in error will not contend that its alleged right to put or maintain its poles and wires on the railroad right of way could prevent the State from releasing its railroad, or from enacting a law authorizing its officers to seek the judgment of a proper court on the subject of the alleged rights of the plaintiff in error.

If the Acts or resolution had themselves repudiated contracts made by the State with the telegraph company, or its predecessors in title, or if the Western & Atlantic Railroad Commission had so construed the Act, or undertaken to oust the Telegraph Company under color of the Act, and without giving it an opportunity to be heard, the question might have arisen that by such action the obligation of some valid contract, if there were any, was impaired.

But no such construction was given to the Act or resolution. They were not treated as self-operating ousters of the Telegraph Company, nor did the lower court hold that they were.

The Telegraph Company was not denied the right to be heard and it has been fully heard. The resolution of the Commission amounted simply to the statement that, in the opinion of that body, such a state of facts existed as to justify the institution of a suit to determine the relative rights of the State and the Telegraph Company.

On page 67 of the record appears the claim that the resolution of the Western & Atlantic Railroad Commission was without notice to the Telegraph Company or service upon it of any process calling upon it to be present at any hearing of the Commission, and that no provision was made for it to be heard before the Commission. No such claim was made in the court below.

As well might it be said that a person against whom an indictment was sought from a grand jury had a constitutional right to appear before that body and be heard upon the question as to whether an indictment ought to be returned.

No final action or action of any kind was taken by the Commission, except to authorize institution of legal proceedings, in which could be determined whether the Telegraph Company had the right to continue to occupy the railroad right of way.

IV.

GRANTS FROM THE STATE OF GEORGIA

These alleged grants have been already hereinbefore considered. On page 56 of the record it is asserted that the alleged contract of August 18, 1870, between Blodgett, Superintendent of the Western & Atlantic Railroad (with the approval of Bullock, Governor) and the Western Union Telegraph Company, was sustained by this court in the case of Western Union Telegraph Company vs Western & Atlantic Railroad Company, 91 U. S. 283.

In dealing with this assertion possible confusion may be avoided by keeping in mind the various persons and corporations who have had possession of the railroad.

The railroad was operated by the State of Georgia, under the name of the "Western & Atlantic Railroad," through its officers and agents from the time it was built until, under the Act of October 24, 1870, it was leased for a term of twenty years beginning December 27, 1870, to a corporation known as the "Western & Atlantic Railroad *Company.*" Just prior to this lease the alleged contract of 1870 with the Western Union Telegraph Company was made.

In the case of Western Union Telegraph Company vs Western & Atlantic Railroad Company, 91 U. S. 283, the State of Georgia was in no sense a party. The litigation there was wholly between the Telegraph Company and said lessee.

That suit was a controversy over the ownership of a *particular line of wire,* which the lessee claimed it owned, or had the right to use, under its lease, and the ownership of which, with the right to exact certain payments therefor, was claimed by the Telegraph Company.

This court expressly refused to decide the contention, made by the lessee, that the contract was void, because the Superintendent and the Governor had no power to make it.

After the expiration of the lease of 1870 to the "West-

ern & Atlantic Railroad Company," there came into effect the lease of the railroad made by the State to the Nashville, Chattanooga & St. Louis Railway. Under the terms of the Act providing for this lease the lessee became a body corporate under the name of "Western & Atlantic Railroad Company," a corporation with the same name as that of the first lessee, but an entirely different and distinct entity.

When this second lessee took possession under its lease, to-wit December 27, 1890, there went into effect as to the use and occupation of the right of way by the Telegraph Company, the contract of June, 1884, between the Nashville, Chattanooga & St. Louis Railway and the Telegraph Company.

The alleged contract of August 18, 1870, became inapplicable, and *functus officio*. The Telegraph Company, itself, asserted in the judicial proceedings herein before stated, that "*its right to occupy*" the right of way depended upon the contract of 1884 and that it was necessary for it to "*acquire*" the right of way by condemnation having itself terminated the contract of 1884.

When the second lease expired there came into effect the lease to the Nashville, Chattanooga & St. Louis Railway made under the Act of November 30, 1915, as amended by the Act of August 4, 1916, possession of the railroad passing to said lessee on December 27, 1919.

Under the terms of the lease Act the lessee became in the operation of the railroad, a corporation under the

name of "Western & Atlantic *Railroad.*" So it will be seen that from December 27, 1870 to December 27, 1890, the road was operated, under lease, by the "Western & Atlantic Railroad Company;" from December 27, 1890, to December 27, 1919, under the second lease, by the "Western& Atlantic Railroad Company," a corporation with the same name as but distinct from the first lessee; and that from December 27, 1919, the railroad has been operated, under the third lease, by the Nashville, Chattanooga & St. Louis Railway, lessee, under the corporate name, "Western & Atlantic Railroad."

While the "Western & Atlantic Railroad Company," the second lessee, was operating the railroad, the contract of June 1884, under which the Telegraph Company had from 1890 been on the right of way, was ended by the voluntary act of the Telegraph Company in giving notice, under its provisions, that it would not be of force after August 17th, 1912.

Thereafter in January, 1912, the Telegraph Company notified the "Western & Atlantic Railroad Company," (the corporate name under the second lease), that it "proposes and intends to *acquire* from you by condemnation * * * * a right of way * * * *. The location of the right of way sought to be acquired being the same as that upon which already were the posts and wires of the Telegraph Company; it afterward gave a similar notice to the State of Georgia, and, in its appeal to the court to speed the hearing of the suit for injunction, it asserted: "Defendant is now occupying with its line of telegraph a right of way

on the railroad right of way of said petitioner, under a contract which will expire August 17th, 1912." (The contract of June 1884).

Record pps. 255-257, 262.

It must be evident that the Telegraph Company, itself, placed no reliance upon the alleged Garst & Bean contract, the Act of 1852 and the alleged contract of 1870, and has now asserted rights under them because having found that it could not condemn the right of way, after having itself put an end to the contract of 1884 under which it was "occupying" the same, it has resorted to claims springing from "unconsidered trifles" gathered together by it and its predecessors in years past and buried in its archives.

V.

CLAIM OF PERPETUAL RIGHT OF WAY

The Georgia Statute of December 22, 1843 (Record p. 207) did not authorize the Chief Engineer, with the approval of the Governor, to make the Garst & Bean contract. It made it the duty of the Chief Engineer, under the direction of the Governor, "to progress gradually in the completion of the said W. & A. R. R. with the existing appropriation."

In 1850 the Chief Engineer was not acting under the last mentioned statute. That statute had been modified by Act of December 23, 1847, December 30, 1847 (Record p. 209), and by Act of February 23, 1850 (Record p. 210),

the Governor was expressly forbidden to sell "at any time any part of the right of way."

The use of the telegraph for railroad purposes was unknown in Georgia in 1843 and it was not until December 29, 1847, that construction of telegraph lines in Georgia was authorized at all.

If the contract with Garst & Bean was ratified by the Act of 1852 incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company and the latter Act was constitutional, was the grant one of a perpetual, assignable, unconditional easement?

The grant, under the Act of 1852, was to a named corporation. It contained no words of assignability or perpetuity. It appears, taken in connection with the Mitchell Report, to have been of the privilege of stringing wires on poles furnished and erected by the railroad. Such construction is not of the permanent character of construction of a railroad, (State of Georgia vs Cin. So. Ry. Co., 248 U. S. 26). Nor of a telegraph company operating in a city with poles, wires and house connections, and with privileges of tearing up streets and putting its wires under them in conduits, where the plant and property was "useless when dissevered from the streets," (Louisville vs Cumberland &c Co., 224 U. S. 663-4; Owensboro vs Cumberland Tel. Co., 230 U. S. 58; Essex vs New England Tel. Co., 239 U. S. 321).

The easement claimed by the Telegraph Company in the instant case is of the highest character, perpetual, ir-

revocable and assignable. In other words, the right to forever occupy the railroad right of way, in no defined location, without right, on the part of the State, to recall or put an end to the privilege, and with the right in the Telegraph Company to assign this perpetual, irrevocable easement to any one it saw fit. The Western Union Telegraph Company claims to have acquired a right freed of any obligation, and when enforcement of the obligation has become impossible. Such a right, as against the State, must appear to have been explicitly granted. The Garst & Bean contract does not explicitly do so, nor does the Act of 1852.

Can it be said that a perpetual right is granted without reference to any corresponding obligation on the part of the Telegraph Company?

Clearly, if there was a grant, it was a grant to a particular corporation in the management of which and in dividends from which the State was to participate. How was that right of participation in management and in dividends to be preserved, if the easement could be assigned to others? How was it preserved in the assignment claimed to have been made.

> "Contract rights coupled with liabilities, or involving a relation of personal confidence between the parties, can not be transferred to a third person by one of the parties to the contract without the assent of the other."
>
> Tifton, Thomasville & Gulf Ry Co. vs Bedgood and Co., 116 Ga. 945.

"Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided."

Pollock, Cont. 4th ed. 425, quoted with approved by Mr. Justice Gray in Arkansas Valley Smelting Co. vs Belden Mining Co., 127 U. S. 379.

See, also, to same effect:

Delaware County vs Diebold Safe & Lock Co., 133 U. S. 473.

Burck vs Taylor, 152 U. S. 634, 651.

5 Cor. Ju. 878-882.

Pike vs Waltham, 168 Mass. 581.

New York Bank Note Co. vs Kidder Press Mfg. Co., 192 Mass. 405.

Schlessinger vs Forest Product Co., 78 N. J. L. 642.

Colton vs Raymond, 114 Fed. 869.

Morris & Co. vs Central R. Co., 19 N. J. Eq. 372.

But in the instant case there was no assignment of the Garst & Bean contract or of the grant, if there was a

grant, to the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

The history of that company as revealed in the record is that within a few years after the grant of the charter it became insolvent, that whatever it had went out of it not by assignment or transfer made by it, and that Hammett acquired from it, by sale under a comon law execution against it, only certain of its property in Richmond County and DeKalb County, Georgia, in neither of which is located any part of the right of way in question, both of which are later in date than the deed of Hammett to Morris et al on which the plaintiff in error relies.

In other words the record shows nothing as to how Hammett or any other person acquired, either by contract or judicial sale, any right which the Augusta, Atlanta & Nashville Magnetic Telegraph Company had or had had in the right of way. (Record pps, 145, 146, 177). There is not in the record any trace of a conveyance to Hammett or Wylly, or any other person of any telegraph line on the Western & Atlantic Railroad from the Atlanta, Augusta & Nashville Magnetic Telegraph Company, or of any sheriff, marshal or other official. There is no evidence that Hammett or Wyley ever had any title.

> "Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public."

St. Clair County Turnp. Co. vs Illinois, 96 U. S. 63, 68.

"The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication."

Coosaw Min. Co. vs South Carolina, 144 U. S. 550, 562.

Knoxville Water Co. vs Mayor &c of Knoxville, 200 U. S. 22-34.

Since special privileges are to be strictly construed, no franchise which is granted by the State is ever construed to be perpetual, whether it is in the nature of a contract or otherwise, unless it is so declared in clear terms or by necessary implication.

Birmingham &c Street R. Co. vs Birmingham Street R. Co., 79 Ala. 465.

Blair vs Chicago, 201 U. S. 400, 463.

VI.

LICENSES ACCOMPANIED BY EXPENDITURES

Under the decisions of the courts above mentioned there can be no such thing as obtaining a license or easement by parol upon the right of way of the Western &

Atlantic Railroad; nor would a written grant be converted from what it was meant to be into something else because the grantee may have expended money upon or about it. Such a grantee from the State takes his grant, if it would otherwise not be assignable or perpetual, charged with knowledge that it cannot be made so because he may spend money in making or attempting to make a profit out of it.

> "Presumably any right conferred by such a contract on the Telegraph Company to use or occupy railroad property was given only to promote the purposes of the contract, and was intended to last only so long as the relations between the parties established by the contract existed."
>
> Western Un. Tel. Co. vs L. & N. R. R. Co., 238 Fed. 34.

It is said on behalf of plaintiff in error:

"It is certain that the Governor of Georgia approved that contract because the ratifying Act of January 27, 1852, was approved by the Governor of Georgia January 27th, 1852." This seems a *non sequitur*.

VII.

BINDING EFFECT OF DECISION OF SUPREME COURT OF GEORGIA.

The decision of the Supreme Court of Georgia affirmed the judgment of the lower court. This is true though

the Justices presiding were equally divided in number as to whether the judgment should be affirmed or reversed.

There is no rule of construction binding on this court arising from the contention that decisions in earlier cases in the Supreme Court of Georgia were in conflict with the opinion affirming the judgment in the instant case.

None of the decisions of the Supreme Court of Georgia urged by plaintiff in error, upon the question of the constitutionality of an Act, were made prior to the passage of the Act of 1852 incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, so that Gelcke vs Dubuque, 1 Wall. 205, 206 and similar decisions of this court are not applicable. No rights of the Telegraph Company or of its predecessors accrued under such earlier decision. On the contrary, as we have shown above, the earlier decisions of the Supreme Court of Georgia, as well as later ones, are in accord with the decision in the instant case.

We do not understand that decisions of this court relied upon by plaintiff in error are in conflict with the decision of the Supreme Court of Georgia in the instant case.

In Inhabitants of Montclair vs Ramsdell, 107 U. S. 147, an Act of April 9th, 1868 had been passed authorizing certain townships to issue bonds in aid of a railroad. This was expressly indicated and declared in its title. In this Act the Township of Bloomfield was excepted from the operations of the Act. Later, in the same year,

an Act was passed with the title: "An Act to set off from the Township of Bloomfield, in the County of Essex, a new township, to be called the Township of Montclair." In the latter Act was a provision that provisions of Acts from which Bloomfield had been specially excepted in prior Acts, should apply to the Township of Montclair. This court held that the later Act did not offend against the provision of the constitution of New Jersey that "every law shall embrace but one object, and that shall be expressed in its title."

This court said it should be assumed that the legislature which passed the Act of April 9th, 1868 was aware when it passed another Act April 15th, 1868, six days later, of the fact that the earlier Act had expressly excepted the Township of Bloomfield from all of its provisions; and that the provision of the later Act, taking the Township of Montclair from without the exceptions of the former, was sufficiently indicated by the title of the later Act.

It is to be noted that this court did not differ from the decisions of the Supreme Court of New Jersey, but affirmed the decision of the Circuit Court of the United States, which had allowed recovery on the bonds issued by the Township of Montclair.

Attention was given by this court to the decision of the Supreme Court of New Jersey in Rader vs Township of Union, 39 N. J. L. 509, in which Chief Justice Beasley observed that the purpose of the constitutional provision was: "First, to secure a separate consideration for

every subject presented for legislative action; second, to insure a conspicuous declaration of such purpose;" and it was observed that the principle so announced did not conflict with the conclusion reached by this court.

The decision of this court in Detroit vs Detroit &c R. Co., 184 U. S. 368, was based mainly upon that in the Montclair case, *supra,* and upon a decision of the Supreme Court of Michigan; and the decision of the United States Circuit Court for the Eastern District of Michigan was affirmed.

Blair et al vs Chicago, 201 U. S. 400 *Supra,* came up from an United States Circuit Court of Illinois, and was based mainly upon the Montclair case, *supra,* the Detroit case, *supra,* and upon the decision of the Supreme Court of Illinois, in People vs People's Gas &c Co., 205 Ill. 482 in which the Illinois cases were reviewed. This court held that certain Illinois Acts were not obnoxious to the Constitution of Illinois, although their titles were quite broad and general, as the titles did not cover legislation "incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection," the constitutional provision being merely that no law should embrace more than one subject, which should be expressed in its title.

VIII.

COLLATERAL INTERPRETATION

The practice of various executive departments of the

government, as a means of collateral interpretation, cannot determine whether the title to an Act is sufficiently broad to cover the provisions of the Act.

No reason therefor is indicated in Howell vs State, 71 Ga. 224, nor in Wellborn vs Estes, 70 Ga. 390, relied upon by plaintiff in error.

Practice of executive departments cannot convert an unconstitutional into a constitutional Act.

Upon a question merely of interpretation of language the practice of departments may be entitled to some weight, but it should be, as said by Judge Story in 1 Story Com. Const. Sec. 408, "the practical exposition of the government itself, in its various departments, upon particular questions discussed and settled upon their single merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solemn argument *pro re nata,* upon a doubt raised, upon a *lis mota,* and a deep sense of their importance and difficulty, in the face of the nation, with a view to present action in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument, from their exquisite genius, their comprehensive learning, or their deep meditations upon the absorbing topic."

In the instant case none of the elements for giving weight to collateral interpretation, exist.

Indeed, it is doubtful if any one in Georgia was aware of any claim by the Western Union Telegraph Company under the Garst & Bean contract and the Act of 1852, until shortly before the filing of the answer in the instant case.

No such claim was made when the Telegraph Company undertook to condemn the right of way and asserted that it was necessary for it to "acquire" the same by condemnation, nor in the litigation which thereupon ensued, in which it alleged that it occupied the right of way under the contract of 1884.

Its own Vice President, G. W. E. Atkins, did not know even of the existence of the documents until about 1902. (Record p. 290). Its own attorney did not know of such a claim when he instituted the condemnation proceedings. (Record p. 296, 297). Nor did its Vice President, Atkins. (Record p. 298, 299).

In U. S. vs B. & O. R. R. Co., 1 Hughes, 138, the question was not as to any constitutional provision, but was as to whether a contract was limited in time or perpetual in its nature. The Secretary of War had the *power to make the contract,* and the contract made by him "was perpetual in its purport."

This decision was by a District Judge and does not appear to have been appealed from.

There is no question in the instant case as to doubtful construction of a statutory provision, where the settled

practice of a government department will be given weight, as was the case in

U. S. vs Philbrick, 120 U. S. 52.
U. S. vs Alabama Gt. So. R. R., 142 U S. 615.
U. S. vs Johnson, 124 U. S. 253.
Roberts vs Downing, 127 U. S. 607.
U. S. vs Hermonos, 209 U. S. 337.
Johnson vs Towsley, 13 Wall. 72.

IX.

TRANSMISSION OF TITLE OF GARST & BEAN AND OF AUGUSTA, ATLANTA & NASHVILLE MAGNETIC TELEGRAPH COMPANY

Of course if Garst & Bean and the Telegraph Company had no title they could transmit none.

But assuming that they had, no legal transmission of title was shown or pleaded.

Herein before attention has been called to the fact that no assignment or conveyance of title to any interest in the right of way, by the Augusta, Atlanta & Nashville Magnetic Telegraph Company was shown or pleaded, and that no conveyance of any such interest was shown to have been made under any judicial sale of any such interest.

The case is not one for presumption of a grant unless a grant from the State is to be presumed from the as-

sertion of long possession; in other words, unless the well established rule that prescription would not run against the State and laches not be imputed to it be departed from.

There is no such thing as presumption of a grant as against the State, as to the right of way of the Western & Atlantic Railroad, since a grant of any part of that right of way could not be save by Act of the General Assembly, and the right could not be acquired by prescription or laches. The very basis for the presumption is lacking.

"The State can only be estopped from asserting her right to her own property by legislative enactment or resolution."

Alexander vs State of Georgia, 56 Ga. 478.

State of Georgia vs Paxson & Cannon, 119 Ga. 130.

"No prescription runs against the State; and this is true as to the State's title to the Western & Atlantic Railroad as well as the balance of the public domain, and it does not matter whether the road was for the time being in the hands of the State's own officer, or of her tenants or lessees."

Glaze vs Western & Atlantic Railroad Company, 67 Ga. 761.

Kirschner vs Western & Atlantic Railroad Company, 67 Ga. 760.

To the same effect,

Vickers vs Benson, 26 Ga. 590.
State vs Paxson & Cannon, Supra.
Dean vs Feely, 69 Ga. 813.
Herndon vs Strickland, 86 Ga. 323.
Norrell vs Augusta Ry. Co., 116 Ga. 313.
Langley vs Augusta, 118 Ga. 590.
Wade vs Cornelia, 136 Ga. 89.

As to claims of easement by prescription see also:

19 Cor. Ju. 876, 889, 897, 901.

On statute of limitations as against the State, see: Monographic Note, 76 Am. St. Rep. 469, 488, 492-4.

"It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound."

U. S. vs N. C. & St. L. Ry., 118 U. S. 120, 125.
See, also,

U. S. vs Thompson, 98 U S. 486.
U. S. vs Insley, 130 U. S. 265.
U. S. vs Bell Telephone Co., 159 U. S. 554.
Same vs Same, 167 U. S. 265.
Virginia vs West Virginia, 220 U. S. 34.
C. & D. Canal Co. vs U. S., 250 U. S. 123.

"Possession is never adverse to the State, and cannot, no matter how long continued, or in what good faith made, ripen into a title."

Williamson vs Matthews, 32 Ga. 524, 528.

"Estoppels against the State are not favored; and though they may arise from its express grants they cannot arise from the laches of its agents, since persons who deal with an officer of the government are bound to know the extent of his power and authority."

Georgia R. R. & B. K'g. Co., vs Wright, 124 Ga. 618.

Plaintiff in error relied in the lower courts and relies in this court largely upon the opinion in Fletcher vs Fuller, 120 U. S. 534.

That was a case between private parties.

The statutes of Georgia and decisions of its courts have fixed and determined the law of Georgia on the subject, and particularly as to the Western & Atlantic Railroad.

In Trustees of Caledonia County Grammar School vs Kent, 84 Vt. 12, the case of Fletcher vs Fuller was cited, but it was held that where plaintiff trustees of the grammar school *had no power to covey land*, dedicated to it for school purposes, grant of such land could not be presumed from lapse of time.

An examination of the opinion in Fletcher vs Fuller was made in Oregon &c R. Co. vs Grubissich, 206 Fed. 577 (C. C. A. 9th Ct.) and many observations made as to said opinion, which are of interest in the instant case. The case of U. S. vs Chavez, 175 U. S. 520 is cited and distinguished.

It is stated that the "Statutes of Oregon assume to declare upon what the presumption of title may be based," p. 583. (This is true as to the Statutes of Georgia.)

Further, that "the presumption of grant had its origin at the time when there was no registration of conveyances, and the muniments of title were subject to loss or destruction." (p. 583).

Further:

"Nor, according to the policy of the present laws of the States, is there a necessity for including a presumption to support long and uninterrupted possession; the policy of the law in that respect being definitely expressed in statutes of limitation, and in the provisions for the acquisition of title through short periods of adverse pos-

session. These statutes leave little or no room for the indulgence of the presumption of a grant."

And the court cited Wigmore on Evidence, Sec. 2522:

> "But the systematic extension of the principle of acquisition by limitation, the reduction of the required possession to short periods, and (in the United States) the practice of compulsory registration of deeds of conveyance, have left little scope for the presumption."

Again, the court said, "Where the origin of a claim of title is known, there will be no presumption of a lost grant," and, "The presumption cannot arise where the claim is of such a nature as is at variance with the supposition of a grant."

In the instant case, "the origin of the claim of title is known," where the defendant below claimed under a grant; and where it claimed by adverse possession and prescription, as against the State of Georgia, "the claim is of such a nature as is at variance with the supposition of a grant."

In United States vs Chavez, 159 U. S. 452, the case really turned and was decided upon the proposition that the land (in New Mexico), came into possession of the claimants or their ancestors in 1833 and had been held by them ever since, and that these settlers were put "in juridical possession under a grant from the governor of

New Mexico, who, under the laws then in force, had authority to make the grant;" and the express provisions of the treaty between Mexico and the United States.

In U. S. vs Devereaux, 90 Fed. 182, no interest in the land involved was in the United States and, hence, it was held that, in a suit against a third person claiming the land adversely, it could stand only upon the rights of the trustee who held the title.

It was held, also, that the United States could not be prejudiced by any negligence or laches of its officers or agents, nor was it bound by any statute of limitations.

To push the doctrine of presumption to the extent contended for by plaintiff in error would be equivalent to saying: The statute of limitations will not run against the State, laches will not operate against the State, but prescription will—that is if possession has been long and peacefully continued it will be presumed that the right and title which the State had, has been granted by the State;—which is contrary to the rule established in Georgia, and other States, and recognized by this court.

And it is sought to apply it to a case where there is no room for presumption, since plaintiff in error claimed under alleged express grants from the State of 1852 and 1870.

Nor could the plaintiff in error rely upon presumption of a deed from the Augusta, Atlanta & Nashville Magnetic Telegraph Company to Hammett or Wylly.

Deeds to Hammett, under judicial sale, were shown as to property of the last above named corporation, but none as to any property upon or easement in the right of way of the Western & Atlantic Railroad. These deeds were later in date than the deeds of Hammett or Wylly to Morris et al. No evidence introduced or offered pointed to the even probable existence in the past of any conveyance from the corporation of the right of way or interest in it.

There was no evidence introduced or offered of any destruction of records in any but one of the six counties in Georgia and one in Tennessee through which the railroad runs. Nor of any such deed recorded or record thereof indicated in any of them; and the records in that one (Cobb) exist back to 1863.

Even in case of private parties it is not sufficient, for the aid of the presumption, that the party who asks it has proved title to the beneficial ownership and a long possession not inconsistent therewith. He must make it "not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed."

1 Greenleaf on Ev. Sec. 46.

X.

SUMMARY

1. The Garst & Bean contract and the Act of 1852 (the Act incorporating the Augusta, Atlanta & Nashville

Telegraph Company) are not and do not contain valid contracts of the State of Georgia. The Garst & Bean contract, besides its other infirmities, was not executed on behalf of the State by one authorized to do so. It was recognized that it was not and the attempt made by the subsequent Act (of 1852) to ratify it failed because the provisions of the Act were unconstitutional.

The prior decisions of the Supreme Court of Georgia sustain the ruling of that court in the instant case.

2. In the year 1870 the Western Union Telegraph Company, recognizing that it had not good title to the easement, sought to strengthen it by procuring a contract with the then Superintendent of the Western Atlantic Railroad, with the approval of the Governor. But this contract was not a contract of the State of Georgia. It was not made on behalf of the State by one authorized to make it.

It was made just before the State leased the road and appears to have been made with some secrecy, since the lessees asserted in 1872 that they had no knowledge of it when the lease was made. (Record p. 486).

From 1870 to the present the railroad has been in possession of and operated by various lessees of the same. The State has not operated it or recognized, in any way, the claims of the Telegraph Company.

In fact the Telegraph Company asserted in litigation with one of the lessees and the State that it was occupy-

ing the right of way under a contract of June 1884 with the lessee company; and it sought to "acquire" the use of the right of way by condemnation.

It is mere assumption to state that the State of Georgia or its lessees have received benefits from the alleged contracts of 1850, 1852 and 1870 which they would not otherwise have received; nor is there any evidence that the defendant below and its predecessors have not been fully compensated.

3. The validity of the contract of 1870 was not passed upon by this court. Neither the State of Georgia nor the present lessee was a party to the case of the Western Union Tel. Co. vs Western & Atlantic Railroad Company, 91 U. S. 283. The State of Georgia has had no benefit from that contract. It was not enabled thereby to make a more advantageous lease. The lessees in the lease made in 1870 had never heard of it until after the lease was made; nor has the State or the then or succeeding lessees continued to accept the benefit of that contract.

4. No law has ben enacted by the State of Georgia impairing the obligation of any contract with the Western Union Telegraph Company or its predecessors; and neither the petition for certiorari nor the writ of error present a case calling for the intervention of the powers of this court, or a reversal of the court below.

5. For many years the Telegraph Company has been occupying the railroad right of way and enjoying the

use of the same and the revenue derived therefrom, without lawful right. Some thirteen years have passed since it, itself, terminated the contract of 1884 by virtue of which it occupied the right of way, and sought to "acquire" the right by condemnation. It has for all that time remained in possession, without any contract right or recognition of any right of the State or the lessee. During all that time it has had the use of the right of way, in controversy with the State and lessee and with no benefit, of any sort, to either.

The decree of the lower court that it should now give up that possession is just and, we respectfully claim, should be affirmed.

Respectfully Submitted,

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